SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 9 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1969 217

JOHNNIEMAE PATTERSON TIETZ, et al.,
Plaintiffs and Appellants,

vs.

MICHAEL J. MARIENTHAL, et al.,
Defendants and Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

JURISDICTIONAL STATEMENT

J. B. TIETZ
257 South Spring Street
Los Angeles, California
Attorney for Appellants

ARTHUR E. BRIGGS
Of Counsel

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3010

BLANK
PAGE

INDEX

Jurisdictional Statement 1
Opinion Below 2
Jurisdiction 2
The Statutes Involved 3
Statement of the Case 4
Federal Question Presented 5
Summary of Argument 7
The Federal Questions Are Substantial 8

Point I. The Decision of the District Court of Appeal Holding That the California Administrative Code Gives Immunity to the School Principal from Liability for His Tort of Threat and Duress Denies Due Process of Law and Equal Protection of Law to Plaintiff-Appellant 8

Point II. The Defendants School District and Board of Education Are Liable for the Principals' Wrongful Act Within the Scope of Their Employment under the Provisions of the California Labor Code, and the Sustaining of the Demurrer on the Ground That the Wrongful Acts of the Principals Are Within the Scope of Their Authority Deprives Appellants of Due Process of Law 15

Point III. By Sustaining the Demurrer Mrs. Tietz Is Denied the Due Process of Proceeding under the Provisions of Labor Code 3601, on the Ground of Discretionary Authority to Commit the Tort 20

Point IV. State Court's Holding That Notice of Claims Statutes Are Applicable to This Case As Ground for Sustaining Demurrer Is Denial of Due Process to Appellants 23

Point V. An Appeal Lies in This Case on the Grounds of Denial of Due Process of Law and of

Equal Protection of Law by Reason of the Decision of the State Court of Last Resort Having Sustained the Demurrers to Plaintiff-Appellants' Complaint . 28

Summary and Conclusion 29
Appendix B, Superior Court Decision A1
Appendix C, Opinion of the District Court of Appeal of the State of California, Second Appellate District .. A3
Appendix D, California Labor Code A13

TABLE OF CASES

Aebli v. *Board of Education*, 62 C.A. 2d 706, 145 P.2d 601, 628 15
Ahern v. *Livermore*, S.D., 208 Cal. 770, 284 Pac. 1109 16
Alva v. *Sequoia Union High School Dist.*, 98 C.A. 2d 656, 220 P.2d 788 9
Board of Education v. *Swan*, 41 C.A. 2d 546, 261 P.2d 261 13
Boland v. *Vanderbilt*, 140 Conn. 520, 102 A.2d 362 12
Bowden v. *Spiegel, Inc.*, 96 C.A. 2d 763, 216 P.2d 271 ..11, 12
Bridge v. *Bd. of Ed. L. A.*, 2 C.A. 2d 398, 38 P.2d 199 ....16, 17
Carrie v. *Bender*, 143 Cal. App. 2d 198, 300 P.2d 119 28
Carter v. *Super. Court*, 142 C.A. 2d 350, 298 P.2d 598 ....22, 23, 24, 26
Conway v. *Globin*, 105 C.A. 2d 495, 233 P.2d 612 .....22, 26
Comstock v. *Board of Trustees*, 20 C.A. 2d 731, 67 P.2d 694 9
Cook v. *Davis*, 178 F.2d 595 17
Deauville v. *Hall*, 188 Cal. App. 2d 535, 10 Cal. Rep. 511, 514 (3) 23
Deevy v. *Tassi et al.*, 21 C. 2d 124, 130 P.2d 389 12
DiGenova v. *State Bd. of Ed.*, 57 Cal. 2d 167, 367 P.2d 865, 18 Cal. Rep. 369 19
Dupuy v. *Tedora*, 204 La. 560, 15 So.2d 886 10-11
Emden v. *Vitz et al.*, 88 C.A. 2d 313, 198 P.2d 696 11
Fairfield v. *Am. Photocopy Equip. Co.*, 138 C.A. 2d 82, 291 P.2d 194 12

Farnsworth v. *Cote*, 199 C.A. 2d 762, 19 Cal. Rep. 45 24
Grimes v. *Gates*, 47 Vt. 594, 19 Am. Rep. 129 11
Grosjean v. *American Press Co.*, 297 U.S. 233, 244, 80 L. Ed. 660, 665, 56 S. Ct. 444 10
Grover v. *San Mateo Jr. Coll.*, 146 C.A. 2d 86, 303 P.2d 602 ..... 16, 19, 24
Kacsur v. *Board of Trustees*, 18 Cal. 2d 586, 116 P.2d 593 13
Kauke v. *Lindsay*, U.S. Dist., 46 C.A. 2d 975, 115 P.2d 576 15
Keesin v. *Board of Education*, 1 Cal. 2d 706, 37 P.2d 74 .. 17
Kline v. *S. Fr.*, U.S. Dist., 40 C.A. 2d 174, 104 P.2d 661, 105 P.2d 362 19
Kraft v. *Smith*, 24 C. 2d 124, 148 P.2d 23 17
La Flower v. *Merrill*, (N.D. Calif.) 28 F.2d 784 17
Larive v. *Willitt*, 154 C.A. 2d 140, 315 P.2d 732 12
Leeper v. *Beltrami*, 53 Cal. 2d 195, 203, 1 Cal. Rep. 12, 77 A.L.R. 2d 903 14
Lehmuth v. *Long Beach*, U.S.D., 2 Cal. Rep. 279, 53 C. 2d 544 16
Lilienthal v. *San Leandro Unified School District of Alameda County*, 139 C.A. 2d 453, 293 P.2d 889 ..... 15, 17
Lindley v. *Knowlton*, 179 Cal. 298, 176 Pac. 440 12
Lipman v. *Brisbane Elementary Sch. Dist. et al.*, 55 C. 2d 524, 11 Cal. Rep. 97, 99 ff 16
Lloyd v. *R.K.O. Pictures, Inc.*, 136 Cal. App. 2d 638, 289 P.2d 295 28
Lowman v. *Stafford*, 226 Cal. App. 2d 31, 35, 37 Cal. Rep. 681, 683 21
Maede v. *Oakland H. S.*, 212 Cal. 419, 298 Pac. 987 17
Mass v. *Board of Education*, 61 C. 2d 612, 39 CR 739, 394 P.2d 579 9
Matteson v. *State Board of Education*, 57 C.A. 2d 991, 136 P.2d 120 ..... 13, 14
Merritt Land Co. v. *City of Oakland*, 154 C.A. 2d 717, 316 P.2d 672 24

Midway School District v. *Griffith*, 29 Cal. 2d 13, 17, 172 P.2d 857, 859 9
Muskopf et al. v. *Corning Hospital District*, 55 C. 2d 211, ... Cal. Rep. 89 16
Pavesich v. *New England Life Ins. Co.*, 50 S.E. 70, 123 Ga. 190, 69 L.R.A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561 10
People v. *Fox*, 157 C.A. 2d 426, 321 P.2d 103 11
People v. *Oppenheimer*, 209 C.A. 2d 413, 26 Cal. Rep. 18 15
Porter v. *Bakersfield, etc., Electric Ry. Co.*, 36 Cal. 2d 582, 225 P.2d 223 27
Reed v. *City Council*, 60 Cal. App. 2d 628, 141 P.2d 459 .. 17
Richardson v. *Pridmore et al.*, 97 C.A. 2d 124, 129-130, 217 P.2d 113, 17 A.L.R. 2d 929 11
Saala Case, 63 A. C. 120, 45 Cal. Rep. 144 21
Sarafini v. *City & Co. S. F.*, 143 C.A. 2d 570, 300 P.2d 44 24
Scott v. *Ind. Acc. Com.*, 46 Cal. 2d 76, 293 P.2d 18 .....23, 24
Screws v. *United States*, 140 F.2d 662, 162 A.L.R. 1330 .. 10
Sloane v. *So. Cal. Co.*, 111 Cal. 668, 44 Pac. 320, 32 A.L.R. 193 12
State Rubbish Collectors Ass'n v. *Siliznoff*, 38 C. 2d 330, 240 P.2d 282, 284 f 11, 13
State v. *Wilbourn*, 257 N.W. 571, 257 Iowa 120, 125 11
Tate v. *Canonica*, 180 C.A. 2d 898, 5 Cal. Rep. 28 .....11, 12
Thatcher v. *The City Terrace Cultural Center*, 181 Cal. App. 2d 433, 5 Cal. Rep. 396 28
Tiedje v. *The Aluminum Paper Co.*, 46 Cal. 2d 450, 296 P.2d 554 28
Titus v. *Lawndale School Dist.*, 157 C.A. 2d 822, 322 P.2d 56 .....13, 14
U. S. F. & G. Co. v. *Oak Grove*, 22 Cal. Rep. 907 .....16, 24
Whitson v. *LaPay*, 153 C.A. 2d 584, 315 P.2d 45 24

STATUTES AND OTHER AUTHORITIES

Am. Jur., Statutes, §60 20
Cal. Ann. Restatement of Torts, Sec. 867, p. 119 24
43 Cal. Jur. 2d 677, Note 16 27
44 Cal. Jur. 2d 213, Sec. 507 13
44 Cal. Jur. 2d 220, Sec. 517 13
44 Cal. Jur. 2d 252, Sec. 541 14
Cal. Jur. 2d, Schools, §11 20
Cal. Jur. 2d, Statutes, §72 20
Calif. Law Revision Commission Report, Vol. 5, 1963, pp. 42, 538 ..... 17, 18
California Administrative Code, Title 5, Article 3, §16; Article 8.7, §78.9 3
California Education Code, §§2, 22, 903, 926, 13263-67, 13317, 13403, 13404, 13405, 13406, 13407-13411; 13559-60 ..... 3, 9, 13, 14, 15, 16, 19, 20, 23, 24, 26
California Government Code, §§703(d), 801, 905(d) and 935 ..... 3, 20, 23, 24, 25, 26
California Labor Code, §3209 25
California Labor Code, §3601 ..... 3, 20, 21, 22, 23, 24, 25, 26, 27
78 C.J.S. 1089, §294a 9
86 C.J.S. 789, Note 51 12
86 C.J.S. 807, Threats, Sec. 27; citing 62 C.J. 945, Note 45 11
Fourteenth Amendment of the United States Constitution 3, 10, 29
Gov. C. 9606; CCP 1049 ..... 20, 24
McK. Dig., Statutes, §34 20
Professor Arvo Van Alstyne, in his 1964 text, California Government Tort Liability 18
Restatement of Law, Damages, 542, Sec. 905 12
Restatement of Law, Torts, Sec. 873 11
Stern & Gressman's "Supreme Court Practice" (Third Edition), p. 67 28
28 USC, §1257(2) 3
25 Words and Phrases, 177 *et seq.* 10
41 Words and Phrases 596 12

BLANK
PAGE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. .....

JOHNNIEMAE PATTERSON TIETZ, et al.,
Plaintiffs and Appellants,

vs.

MICHAEL J. MARIENTHAL, et al.,
Defendants and Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

JURISDICTIONAL STATEMENT

Appellants appeal from the decision of the District Court of Appeal of the State of California, Second Appellate District, entered on December 21, 1965, which affirmed the judgment of the Superior Court for the State of California for the County of Los Angeles, entered on May 4, 1964, a

copy of said District Court of Appeal judgment is attached hereto as Appendix A.* A copy of the Superior Court Judgment is attached as Exhibit B. This jurisdictional statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented

OPINION BELOW

The opinion of the District Court of Appeal of the State of California, Second Appellate District, is reported at 238 A.C.A. 1028, and appears as Appendix C hereto. The Superior Court of Los Angeles County is a County Court of general jurisdiction for trial. It did not render an opinion, and the Supreme Court of the State of California denied a petition for hearing without an opinion.

JURISDICTION

Appeal was taken from judgments of dismissal after sustaining the demurrers of respondent, Los Angeles Unified District, Board of Education of the City of Los Angeles, and respondents, Evelyn L. Marienthal and Phyllis O. Morey (being wives of the principals) without leave to amend, and from judgment of dismissal after sustaining the demurrer respondents Michael J. Marienthal and Herbert E. Morey (herein called "principals") with leave to amend, appellants not having amended. The public school agency and the wives had demurred to two previous complaints, and all parties demurred to the second amended complaint after which judgment was entered.

The allegations in all causes of action in the complaint, aside from the elements of damage referred to in the different causes of action, are substantially the same.

---

*The clerk of this court informs counsel that the opinion is the judgment. The opinion is Appendix C, hereinafter.

The decision of the District Court of Appeal denied appellants' petition for rehearing. A petition for hearing to the California Supreme Court was denied by that court on February 16, 1966. Notice of Appeal to the Supreme Court of the United States was filed on April 13, 1966, in the California District Court of Appeal.

Appellants challenge the decision of the District Court of Appeal upholding the state statutes involved, as giving to the principals authority to commit the intentional and wilful tort of threat and duress upon plaintiff teacher-librarian, on the ground that, as applied to their activities, it is repugnant to the 14th Amendment of the United States Constitution, and that the decision of the highest court of the state was in favor of its validity.

The jurisdiction of the Supreme Court to review this decision is conferred by 28 USC, §1257(2).

THE STATUTES INVOLVED

The Fourteenth Amendment of the United States Constitution is involved.

The State statutes involved are primarily California Administrative Code, Title 5, Article 3, §16; Article 8.7, §78.9, copy of which is in the District Court of Appeal opinion (Appendix C, page A6).

Also involved is the state labor code, §3601. A copy is attached as Appendix D.

Incidental thereto the following sections of the California Education Code are involved to-wit: 903, 926, 13263-67, 13317, 13403, 13404, 13407, 13559-60 and the California Government Code, §§703(d), 801, 905(d) and 935.

STATEMENT OF THE CASE

The facts are substantially as stated in the opinion of the California District Court of Appeal, as follows:

Plaintiff, Mrs. Tietz had permanent tenure as a teacher and as a librarian at Narbonne High School in Los Angeles. Principals, Michael J. Marienthal and Herbert E. Morey, were vice principal and principal, respectively at Narbonne. During the first quarter of 1962 principals threatened appellant in order to induce her to transfer to another school. The threats were made pursuant to a plan to coerce by threats and duress teachers with seniority greater than that of the principals to transfer from Narbonne. In March of 1962, the principals interviewed Mrs. Tietz and stated that her application for a sabbatical leave had been approved but that on her return "We advise you to transfer." In reply to Mrs. Tietz's request for reasons "they [principals] falsely stated to her that certain supervisors had given bad reports and ratings of her work * * *." In addition, principals "grilled her with accusatory questioning of her work as librarian, and pretending to use a number of 3 x 5 cards which were in their hands and falsely claiming that each represented in detail a reported transgression or dereliction of her duties as librarian and teacher; * * *"

Mrs. Tietz's complaint alleges further that she had a fine record, no prior difficulty and that "said claims, which threatened grounds for discipline, dismissal or removal of [appellant] from her said position * * *" were known to be false by the principals and intended to harm her. She asserts mental distress and physical injury, and prays for general and special damages. J. B. Tietz, her husband, also asked for general and special damages.

The foregoing is the substance of the allegations of the complaint with the addition thereto that in Paragraph VIII of the First Cause of Action (incorporated by reference in other causes of action) plaintiff alleges that said tortious acts of defendants were "all in contravention of the laws and Constitution of the State of California and of the Fourteenth Amendment of the United States Constitution in respect to the vested rights of teachers under contract and with permanent tenure, and as respecting the rights of this plaintiff."

Appellants' Opening Brief brought said allegation to the attention of said California District Court of Appeal (p. 4 thereof); also in their Reply Brief (p. 5); again in their Petition for Rehearing (p. 13); and finally in their petition to the California Supreme Court for Hearing (p. 7).

FEDERAL QUESTION PRESENTED

I

The state court's decision denies due process of law and equal protection of law by granting immunity to the principals from liability for their tort of threat and duress committed within the scope of their employment but beyond or in excess of the scope of their authority, as

1. depriving appellant-plaintiff of liberty,
2. by fraudulent means,
3. in violation of the tenure act of the California Education Code.

II

The decision of the state court denies due process of law by giving retroactive effect to statute requiring precedent notice of claim which is enacted subsequent to the accrual of the action and after commencement of suit, in that

1. Under previous statute as theretofore interpreted by California appellate courts of last resort such action was by statute exempt from requirement to give notice of claim to the public entity; and

2. no notice of claim was required as to an individual or private tort-feasor; and

3. the subsequently enacted statute in place of former statute repealed now requires a different kind of notice than that in effect when this suit was commenced as a condition precedent to the bringing of any such action; and

4. the bringing of this action in itself constitutes legal notice of claim; and

5. at the time of the accrual of this action and its commencement the statutory requirement of a notice of claim was not applicable to an action of wilful and intentional tort such as is alleged in the complaint herein.

III

That said decision denies plaintiff-appellants due process of law in that the sustaining of the demurrer as to the public entity, the school district, is against statute and general law which make it responsible and liable in damages for the tortious acts of its employees (the principals) committed within the scope of their employment,

1. Even though in excess of their scope of authority; and

2. When such tort is wilful and intentional such action is maintainable in the court of general jurisdiction (the Superior Court of the State of California) and is not required to be brought in or before the Industrial Accident Commission.

SUMMARY OF ARGUMENT

The California Courts' construction and application of the statute in this case, generally declaring the scope of the supervisory authority of the school principal over the teacher, in effect gives them immunity from liability for their intentional tort of threat and duress, which is in violation of the teacher's rights as long established by statutory law and court decisions, thereby depriving her of the constitutional right of due process of law and equal protection of law. This is one of the two bases of the state appellate court's decision for sustaining demurrer to appellants' complaint.

The other ground of the decision appealed from is that said state appellate court of last resort held applicable to this case statutes enacted subsequent to accrual of this action and to the commencement of this suit, requiring notice of claims to the defendant public entity (the school district), giving retroactive effect to such statutes, notwithstanding their inappropriateness to this action, and because such notice is a condition precedent to action, it was theretofore not required for this kind of action (being expressly exempted therefrom in the previous statute) as then construed by the state court of last resort; and by erroneously sustaining the demurrer on the ground of failure to give such notice of claim deprives plaintiff-appellants of due process of law.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

POINT I

The Decision of the District Court of Appeal Holding That the California Administrative Code Gives Immunity to the School Principal from Liability for His Tort of Threat and Duress Denies Due Process of Law and Equal Protection of Law to Plaintiff-Appellant.

Said decision rests upon the court's construction of the California Administrative Code section as quoted in its opinion, pages 4 and 5, and, as emphasized by the court in holding said statute valid and applying same to this case, the court put a totalitarian emphasis upon the school principals' authority and supervisory control over certified employees, which thereby deprives appellant teacher-librarian of equal protection of the law by due process and equal protection of the law as guaranteed by the Fourteenth Amendment.

As stated by the court:

> "The sole issue before us insofar as the principals are concerned is whether the principals functioned within a discretion inherently or by law made a part of their respective positions."

In such construction and decision based thereon the appellate court ignored other provisions of law, particularly in the Education Code, which limit and restrict the powers of the school authority. The court also failed to distinguish scope of employment and scope of authority. The tort of threat and duress committed was within the scope of employment of plaintiff and defendant-principals, but lay wholly outside the scope of the authority and discretion of the principals.

1

Plaintiff was a certified teacher-librarian, with many years of established tenure, and her rights of employment were protected by the teacher tenure statutes.

The principals' authority and discretion under said tenure acts do not include employment and do not include removal, dismissal or transfer of a teacher-librarian, such power being vested under California law solely in the Board of Education and the courts.

California Education Code, Sections 13404, 13404.5, 13405, 13406, 13407, 13408, 13409, 13410 and 13411. The law as it now stands is briefly summarized in *Midway School District* v. *Griffith*, 29 Cal. 2d 13, 17, 172 P.2d 857, 859:

> "In such cases the board has the administrative function of initiating the charges, of filing the complaint on request, and of compliance with the judgment of the court—with the qualification that a judgment determining that the board may dismiss the defendant is not to be deemed a matter of direction or compulsion."
>
> *Mass* v. *Board of Education*, 61 Cal. 2d 612, 618, 394 P.2d 579.

> "Where the statute expressly provides that the removal of a teacher shall be made in a prescribed manner, all the essential steps to be taken must be at least substantially complied with, and dismissal by any other method is illegal."
>
> 78 C.J.S. 1089, §294a;
>
> *Comstock* v. *Board of Trustees*, 20 C.A. 2d 731, 67 P.2d 694;
>
> *Alva* v. *Sequoia Union High School Dist.*, 98 C.A. 2d 656, 220 P.2d 788;
>
> *Mass* v. *Board of Education*, 61 C. 2d 612, 39 CR 739, 394 P.2d 579.

The method adopted by the principals to force transfer to another school by Mrs. Tietz was illegal and in violation of her constitutional rights.

Furthermore, the fundamental right of individual liberty is a higher law than the discretionary power vested in administrative officials and is protected and guaranteed by constitutional law.

"Liberty", as used in the Fourteenth Amendment, embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as well.

> 25 Words and Phrases, 177 *et seq.*
>
> *Screws* v. *United States,* 140 F.2d 662, 162 A.L.R. 1330;
>
> *Grosjean* v. *American Press Co.,* 297 U.S. 233, 244, 80 L. Ed. 660, 665, 56 S. Ct. 444;
>
> *Pavesich* v. *New England Life Ins. Co.,* 50 S.E. 70, 123 Ga. 190, 69 L.R.A. 101, 106 Am.St. Rep. 104, 2 Ann. Cas. 561, citing Brannon, 14th Amendment 111.

2.

Clearly here it is alleged that defendant principals, "under color of official right," threatened to expose plaintiff-appellant to disgrace of public proceedings for dismissal from her position as certified school librarian if she would not transfer to another school, which is alleged to be wrongful and without just cause, and upon those allegations she is entitled to the due process of a trial to establish the facts alleged.

> " 'Due process of law' means that no person shall be deprived of life, liberty, property, or of any right granted him by statute, unless the matter involved shall

have been adjudicated against him on trial conducted according to established rules regulating judicial proceedings, and it forbids condemnation without hearing."

Dupuy v. *Tedora,* 204 La. 560, 15 So.2d 886.

3.

As to the sufficiency of the complaint:

a. Nature of Action.

"The cause of action arises in such case from the threat and the consequent damage."

86 C.J.S. 807, Threats, Sec. 27; citing 62 C.J. 945, Note 45;

State Rubbish Collectors Ass'n v. *Siliznoff,* 38 C.2d 330, 240 P.2d 282, 284 f;

Tate v. *Canonica,* 180 C.A. 2d 898, 5 Cal. Rep. 28;

Bowden v. *Spiegel, Inc.,* 96 C.A. 2d 763, 216 P.2d 271;

Emden v. *Vitz et al.,* 88 C.A. 2d 313, 198 P.2d 696;

Grimes v. *Gates,* 47 Vt. 594, 19 Am. Rep. 129;

Richardson v. *Pridmore et al.,* 97 C.A. 2d 124, 129-130, 217 P.2d 113, 17 A.L.R. 2d 929.

Restatement of Law, Torts, Sec. 873 (intentionally false statement).

b. Pleading Tort of Threat:

A threat "may be expressed in very general or vague terms indicating nature of accusation; may be made by innuendo or suggestion. . . . All that is necessary is that it be definite and understanding to a mind of ordinary intelligence."

State v. *Wilbourn,* 257 N.W. 571, 257 Iowa 120, 125, citing 62 C.J. 933, Sections 4 and 6;

People v. *Fox,* 157 C.A. 2d 426, 321 P.2d 103.

"The threat need not be in any particular form."

86 C.J.S. 789, Note 51, citing *People* v. *Powell*, 1 Cal. App. 2d 222, 36 P.2d 201.

Circumstances may make even a "simple request" an actionable, tortious threat.

41 Words and Phrases 596, citing *Ex parte Richards*, 117 Fed. 658, 666.

In *Bowden* v. *Spiegel, Inc.*, 96 C.A. 2d 763, 216 P.2d 571, judgment sustaining demurrer without leave to amend was reversed and the elements of the tort of intentional threat are clearly defined and illustrated by references to cases.

In the analogous matter of slander, see *Larive* v. *Willitt*, 154 C.A. 2d 140, 315 P.2d 732, where sustaining of demurrer was reversed.

c. The Physical Injury.

Disturbances of the nervous system are physical injuries and recognized elements of damage.

Deevy v. *Tassi et al.*, 21 C. 2d 124, 130 P.2d 389;

Restatement of Law, Damages, 542, Sec. 905;

Sloane v. *So. Cal. Co.*, 111 Cal. 668, 44 Pac. 320, 32 A.L.R. 193;

Tate v. *Canonica*, 180 C.A. 2d 898, 5 Cal. Rep. 28;

Lindley v. *Knowlton*, 179 Cal. 298, 176 Pac. 440 (chimp fright);

Fairfield v. *Am. Photocopy Equip. Co.*, 138 C.A. 2d 82, 291 P.2d 194.

(Misuse of name; wrong is not libel, but invasion of "right of privacy", damage to feelings.)

Boland v. *Vanderbilt*, 140 Conn. 520, 102 A.2d 362.

In the case of *State Rubbish Collectors Ass'n* v. *Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282, the Supreme Court reviewed the authorities and held that recovery may be allowed "where physical injury resulted from intentionally subjecting the plaintiff to serious mental distress."

4

As alleged in the complaint (Paragraphs I and VIII of its first cause of action), transfer to another school, which respondents attempted by *duress and threats* to induce plaintiff to do, besides violating her constitutional right of liberty, also would and did affect her as a threat to her tenure and seniority, in which she had a contractual and vested statutory right.

School tenure is here a vested right of both contract and statute.

Kacsur v. *Board of Trustees*, 18 Cal. 2d 586, 116 P.2d 593.

Titus v. *Lawndale School Dist.*, 157 C.A. 2d 822, 322 P.2d 56.

Employee can be deprived of this right only by court action as provided by the Education Code.

44 Cal. Jur. 2d 220, Sec. 517;

Matteson v. *State Board of Education*, 57 C.A. 2d 991, 136 P.2d 120;

Ed. Code. 13403, 13407, 13410.

An employee with tenure may be dismissed only for one or more of the causes specified in the code.

44 Cal. Jur. 2d 213, Sec. 507;

Board of Education v. *Swan*, 41 C.A. 2d 546, 261 P.2d 261.

A permanent employee cannot be discharged without formal charges and employee must have opportunity to demand a hearing.

Ed. Code 13404;

Titus case, 157 C.A. 2d 822;

Matteson case, 57 C.A. 2d 991.

Any abuse or insult to a teacher in the presence of a pupil or school personnel is a misdemeanor.

Ed. Code 13559-60.

"Any person whose wilful or other culpable negligence violates any provisions of the Education Code dealing with the merit system is guilty of a misdemeanor." (Emphasis supplied).

44 Cal. Jur. 2d 252, Sec. 541.

The implied threat to make charges against Mrs. Tietz if she would not transfer to another school was an unlawful act affecting her right of tenure and constitutes duress and intimidation.

Leeper v. *Beltrami*, 53 Cal. 2d 195, 203, 1 Cal. Rep. 12, 77 A.L.R. 2d 903, from which we quote the following:

"Under modern law duress is not limited to threats against the person. It may also consist of threats to business or property interests. Sistrom v. Anderson, 51 Cal. App. 2d 213, 220-221, 124 P.2d 372; 5 Williston on Contracts, 4517-4518, §1617; 40 Cal. L. Rev. 425; Restatement of Contracts, §493. The modern doctrine has been recognized in California. Young v. Hoagland, 212 Cal. 426, 430-431, 298 Pac. 996, 75 A.L.R. 654; Thompson Crane & Trucking Co. v. Eyman, 123 Cal. App. 2d 904, 910-911, 267 P.2d 1043." [1 Cal. Rptr. at 18].

People v. *Oppenheimer*, 209 C.A. 2d 413, 26 Cal. Rep. 18;

Ed. Code 13317.

By transferring to another school Mrs. Tietz would have lost her seniority.

Ed. Code 13263-67.

Transfer to another school means loss of seniority and possible loss of tenure before the second year.

Ed. Code 13317;

Kauke v. *Lindsay*, U.S. Dist., 46 C.A. 2d 975, 115 P.2d 576.

Seniority rights depend on rating, and once status is fixed a board has no power to change that rating.

Aebli v. *Board of Education*, 62 C.A. 2d 706, 145 P.2d 601, 628.

POINT II

The Defendants School District and Board of Education Are Liable for the Principals' Wrongful Act Within the Scope of Their Employment under the Provisions of the California Labor Code, and the Sustaining of the Demurrer on the Ground That the Wrongful Acts of the Principals Are Within the Scope of Their Authority Deprives Appellants of Due Process of Law.

1.

The Liability of the Public Entity.

School District is liable for principal's acts.

Education Code, §903 (repealed 1963), but was in force when this action accrued and was commenced;

Lilienthal v. *San Leandro Unified School District of Alameda County*, 139 C.A. 2d 453, 293 P.2d 889;

Bridge v. *Bd. of Ed. L. A.*, 2 C.A. 2d 398, 38 P.2d 199;

Muskopf et al. v. *Corning Hospital District*, 55 C. 2d 211, Cal. Rep. 89;

Lipman v. *Brisbane Elementary Sch. Dist. et al.*, 55 C. 2d 524, 11 Cal. Rep. 97, 99 ff;

Lehmuth v. *Long Beach*, U.S.D., 2 Cal. Rep. 279, 53 C. 2d 544;

Grover v. *San Mateo J. C.*, 146 C.A. 2d 86, 303 P.2d 602.

This action was begun in the year 1962, and the law then in force is applicable to this action, and not the law as amended in 1963. However, for convenience of reference we call attention to the changes which have taken place and especially the renumbering of the statutes to assist in the identification of the statutory principles applicable to this case as follows:

a. Education Code 903; replaced former Ed. C. 1007 (repealed 1963):

Lehmuth v. *Long Beach*, U.S. Dist., 53 C. 2d 544, 2 Cal. Rep. 279.

"The governing Board of any school district is liable as such in the name of the district for any judgment against the district on account of injury to person or property arising because of the negligence of the district or its officers or employees." Ed. C. 903.

b. District's Liability Embraces Intentional Acts.

Lipman v. *Brisbane Elementary School*, 55 Cal. 2d 224, 229 ff, 11 Cal. Rep. 97, 359 P.2d 465;

U. S. F. & G. Co. v. *Oak*, U.S. Dist., 22 Cal. Rep. 907, 912, 205 A.C.A. 266;

Ahern v. *Livermore*, S.D., 208 Cal. 770, 284 Pac. 1109;

Maede v. *Oakland H. S.*, 212 Cal. 419, 298 Pac. 987;

See Calif. Law Revision Commission Report, Vol. 5, 1963, p. 42.

c. Intentional and Wilful Act of Employee Within Scope of Employment Is Imputed to Employer.

Lilienthal v. *San Leandro*, S.D., 139 C.A. 2d 453, 293 P.2d 889.

See as to constructive notice—

Bridge v. *Board of Education, L.A.*, 2 C.A. 2d 398, 38 P.2d 199.

d. Master and Servant May Both Be Joined in a Single Cause of Action.

La Flower v. *Merrill*, (N.D. Calif.) 28 F.2d 784.

e. The Incorporation by Reference Here in Each Cause of Action Constitutes a Single Action Against Master and Servant Jointly.

Kraft v. *Smith*, 24 C.2d 124, 148 P.2d 23.

f. Mrs. Tietz' Substantive Rights Are Affected.

Keesin v. *Board of Education*, 1 Cal. 2d 706, 37 P.2d 74 (a vested right).

Cook v. *Davis*, (C.A. 5), 178 F.2d 595 (denying equal protection); transferring of Mrs. Tietz from the Narbonne School to another school would reduce her status and privileges and would deny her equal protection of the law.

See analogous case: *Reed* v. *City Council*, 60 Cal. App. 2d 628, 141 P.2d 459;

Cook v. *Davis*, 178 F.2d 595.

2.

These Substantive Rights Are Not Altered by Repeal of Statutes.

As stated in the summary of California Law Revision Commission Reports, Recommendations and Studies, 1963, Vol. V, p. 538:

> "The Legislature apparently could not constitutionally abolish or curtail the range or application of previously recognized statutory or common law causes of action which arose between the date of the Muskopf decision and the effective date of the abolishing or curtailing legislation."

The advisor to the legislative committee for the 1963 Amendment, Professor Arvo Van Alstyne, in his 1964 text, California Government Tort Liability, reviews the 1963 legislation and the prior laws and this is especially important here for his comments on intentional torts and the Workman's Compensation Act exemption from the claims statute. Therefore we quote the following therefrom:

> "D [§1.22] Intentional Torts.
>
> "The liability of public entities for intentional torts of their employees engaged in proprietary activities was long accepted in California law prior to Muskopf. Ruppe v. City of Los Angeles, (1921) 186 Cal. 400, 199 Pac. 496 (assault and battery by power department employee). Whether the doctrine of immunity for governmental activities totally absolved public bodies from intentional tort liability is not entirely clear. Several decisions used somewhat vague language to declare that intentional acts, directed to be performed by the public entity and inherently wrong in their nature, were a basis of liability. Kaufman v. Tomich, (1929) 208 Cal. 19, 280 Pac. 130; Perkins v. Blauth, (1912) 163 Cal. 782, 127 Pac. 50; Black v.

Southern Pac. Co., (1932) 124 C.A. 321, 12 P.2d 981. No clear explanation of the meaning of 'inherently wrong' was advanced in any of the cited decisions."

". . . a recent important decision (holding that a public entity, though acting in a governmental capacity, is liable for fraud) emphasized that the plaintiff had pleaded his action on the permissible theory of fraudulent breach of contract. Souza & McCue Constr. Co. v. Superior Court, (1962) 57 Cal. 2d 508, 20 C.R. 634. Public entities, of course, have generally not been immune from liability in contract. See §1.5.

"It may be concluded, therefore, that prior to Muskopf public entities generally were not liable for intentional torts committed in the course of governmental activities, absent a statutory rule to the contrary. In this respect, the California Tort Claims Act effects a substantial change. Liability is now postulated on all kinds of tortious conduct recognized for private persons, with only those exceptions declared by statute, thereby including a significant number of intentional torts. See Govt. C. §§810.8, 815.2, 820(a)."

SCHOOL STATUTES

School district liability in this case is based on Ed. Code 903 (repealed 1963). These statutes are to be liberally construed:

Ed. Code 2;

DiGenova v. *State Bd. of Ed.*, 57 Cal. 2d 167, 367 P.2d 865, 18 Cal. Rep. 369;

Kline v. *S. Fr.*, U.S. Dist., 40 C.A. 2d 174, 104 P.2d 661, 105 P.2d 362;

Grover v. *San Mateo Jr. Coll.*, 146 C.A. 2d 86, 303 P.2d 602.

Ed. Code 22: "No action or proceeding commenced before this code takes effect, and no right accrued, is affected by the provisions of this code, but all procedure thereafter taken therein shall conform to the provisions of this code so far as possible."

Cal. Jur. 2d, Schools, §11;
Cal. Jur. 2d, Statutes, §72;
McK. Dig., Statutes, §34;
Am. Jur., Statutes, §60.

Repeal of statute does not affect vested rights: Gov. C. 9606; CCP 1049.

CLAIMS STATUTES

The Legislature of 1963 renumbered the claims sections and made other alterations and additions. The Tietz case was filed before these were enacted, but new section Gov. Code 905(d) is same as old G. C. 703(d). Its reference to Labor Code 3601 (unchanged) as an exception from claims statute is important and we show that this Tietz case is within that exception.

Gov. C. 935 (former 730) of 1963, giving local districts authority to enact limitation ordinances, is not applicable to Tietz case.

POINT III

By Sustaining the Demurrer Mrs. Tietz Is Denied the Due Process of Proceeding under the Provisions of Labor Code 3601, on the Ground of Discretionary Authority to Commit the Tort.

1.

The allegations of the complaint make applicable here the provisions of Labor Code 3601(a) and (3).

This Court's Decision erroneously denies the right of plaintiff to bring the special action expressly provided for in said section 3601 as an exception in case of a wilful tort.

This Court's decision is in conflict with the holding in the case of *Lowman* v. *Stafford,* 226 Cal. App. 2d 31, 35, 37 Cal. Rep. 681, 683. There the court held that the complaint was demurrable because it did not allege a cause of action under subdivision (1), (2) or (3) of subdivision (a) of said section 3601 and was the "result of simple negligence of a fellow employee." . That case shows clearly that when such allegation of said exceptions is substantially contained in allegations of the complaint, as here, *the complaint is not subject to demurrer.*

See allegations of paragraph VII of the first cause of action, and paragraph II of the second cause of action.

The case of *Saala,* 63 A. C. 120, 45 Cal. Rep. 144, is also relevant here, as showing the application of Labor Code §3601 in a case like this one. For the present case *the defendants' wilful and unprovoked physical act of aggression and reckless disregard for the safety of plaintiff teacher with "a calculated and conscious willingness to permit injury" to plaintiff is substantially alleged* and brings defendant principals within the exceptions of paragraphs (1) and (3) of subdivision (a) of said section. In the *Saala* case the plaintiff was permitted to sue her co-employee in the Superior Court for her injuries. The Supreme Court's holding, as to the phrase "scope of employment", in reversing the decision of the District Court of Appeal, is most significant for the present case, to-wit:

> "The words 'acting within the scope of his employment' should be construed in the light of the purpose of the section, so as not to extend the immunity beyond respondeat superior situations. (*Motal* v. *Industrial Accident Commission*, 29 Cal. Comp. Cases, 224)."

Although the principals acted within the scope of their employment, they exceeded the scope of their *authority,* and therefore they are liable for their torts of threat and duress under the provisions of section 3601 of the Labor Code.

This case is within the remedy of Workman's Compensation Act, Labor Code 3601(a):

> "(1) When the injury or death is proximately caused by the willful and unprovoked physical act of aggression of such other employee.
>
> * * *
>
> (3) When the injury or death is proximately caused by an act of such other employee which evinces a reckless disregard for the safety of the employee injured, and a calculated and conscious willingness to permit injury or death to such employee." Also sub. (b) thereof.

Carter v. *Super. Court,* 142 C.A. 2d 350, 298 P.2d 598;

Conway v. *Globin,* 105 C.A. 2d 495, 233 P.2d 612.

It is obvious that this Court's decision fails to consider the intent of the provisions of said section 3601 *and is in conflict with the Supreme Court's holding,* as above quoted.

The opinion is in error in its statement that "in the present case, no right of action is stated against the actual perpetrators of the alleged wrong." A good cause of action is alleged against the principals under said section 3601 and the judgment sustaining the demurrer as to them and their alleged co-conspirators should be reversed.

The Superior Court when acquiring jurisdiction under said Labor Code 3601(a) has exclusive jurisdiction.

Scott v. *Ind. Acc. Com.*, 46 Cal. 2d 76, 293 P.2d 18.

It was held in *Deauville* v. *Hall*, 188 Cal. App. 2d 535, 10 Cal. Rep. 511, 514 (3), that the Superior Court has jurisdiction of the employer when the "plaintiff has alleged facts constituting an exception to the rule that injured employee must pursue his remedy before the Industrial Accident Commission." As to the principals-defendants, we show below, under Point IV, subparagraph 2 that the Superior Court has exclusive jurisdiction of this action. We believe that the Superior Court also has exclusive jurisdiction to afford full relief as prayed for against all defendants.

Scott v. *Industrial Accident Commission*, 46 Cal. 2d 76, 293 P.2d 18;

Carter v. *Superior Court*, 142 Cal. App. 2d 350, 298 P.2d 598.

POINT IV

State Court's Holding That Notice of Claims Statutes Are Applicable to This Case As Ground for Sustaining Demurrer Is Denial of Due Process to Appellants.

Appellants contend for exemption from the Claims Statute on two grounds: (1) That the tort alleged here is an intentional tort and under the decisions cited by appellants Government Code 801 is not applicable here, and (2) That the exceptions provided for in Ed. Code 926 and Gov. Code 703(d), as to Labor Code 3601a are applicable here and constitute an exception of this action as brought from the requirement of notice of claim under the Claims Statutes. Appellants rest for authority particularly on the cases of—

Scott v. *Ind. Acc. Com.*, 46 Cal. 2d 76, 293 P.2d 18 and *Carter* v. *Superior Court*, 142 C.A. 2d 350, 298 P.2d 598,

and upon the express provisions of Section 3601 of the Labor Code.

Repeal of statute does not affect vested rights: Gov. C. 9606; CCP 1049.

1. Gov. C. 801 (same as former Gov. C. 1981) as to time for filing and presenting claims, does not apply to actions for intentional torts, as in this case.

Sarafini v. *City & Co. S. F.*, 143 C.A. 2d 570, 300 P.2d 44;

Farnsworth v. *Cote*, 199 C.A. 2d 762, 19 Cal. Rep. 45;

Whitson v. *LaPay*, 153 C.A. 2d 584, 315 P.2d 45;

Cal. Ann. Restatement of Torts, Sec. 867, p. 119;

Merritt Land Co. v. *City of Oakland*, 154 C.A. 2d 717, 316 P.2d 672.

2. Exceptions to claims statute (Gov. Code 703(d)) are applicable here, making reference to Labor Code 3601(a).

See Bd. of Ed. C. 926 referring to sections of Gov. Code 703 (d) and Gov. Code 801;

Grover v. *San Mateo J. Coll.*, 146 C.A. 2d 86, 303 P.2d 602;

U. S. F. & G. Co. v. *Oak Grove*, 22 Cal. Rep. 907.

Appellants claim exemption from the Claims Statute under the provisions of former sections, Ed. Code 926 and Gov. Code 703 (d) (new 1963 section Gov. Code 905 (d), which is the same). This action is brought in accordance with the terms of Section 3601 of the Labor Code and the same is wholly applicable here as to exemption from other statutes requiring notice of claim.

In *Scott* v. *Industrial Acc. Com.*, 46 Cal. 2d 736, it was in effect held that where there is concurrent jurisdiction

of the Industrial Accident Commission and the Superior Court, the one which first acquires jurisdiction has exclusive jurisdiction. (See also *Carter* v. *Superior Court*, 142 Cal. App. 2d 350.) It is to be observed that Section 3601 provides for a cause of action which may not theretofore or otherwise have been available and which applies to the present case. An analysis of the statute shows how clearly it applies here. The first clause recites "Where the conditions of compensation exist", and that is the case here, for had plaintiff so chosen, the action might have been filed with the Industrial Accident Commission, but instead of pursuing that remedy under the Workman's Compensation Act, plaintiff sued herein as provided for in Labor Code 3601: "that an employee . . . shall, in addition to the right to compensation against the employer have the right to bring an action at law for damages against such other employee . . . in the following cases:

> "(1) When the injury or death is proximately caused by the willful and unprovoked physical act of aggression of such other employee.
>
> * * *
>
> "(3) When the injury or death is proximately caused by an act of such other employee which evinces a reckless disregard for the safety of the employee injured, and a calculated and conscious willingness to permit injury or death to such employee." Also sub. (b) thereof.

In other words, the statute provides for a cause of action which depends exclusively upon this statute, Labor Code, Sec. 3601, and therefore is wholly within the provision of exclusive remedy provided for in Section 703 (d), now Gov. Code 905 (d).

See definition of "compensation", Labor Code, Sec. 3209, as including "benefit".

The 1963 claims statutes provide for a different mode of notice than theretofore was in effect, and therefore could not be applicable to this action which accrued and was filed before the 1963 statutes were enacted. This also applies to Sections 45 of the Education Code and 945.4 of the Government Code (referred to in the Court's opinion). We have also shown that Section 801 of the Government Code (since repealed) then required notice of claim only in cases of negligence of officers or employees, and was not then applicable to cases of intentional tort, as held in the cases of *Conway* v. *Globin*, 105 Cal. App. 2d 495, 233 P.2d 612, and *Carter* v. *Superior Court*, 142 Cal. App. 2d 350, 298 P.2d 598. As to the principals the Court's opinion is in conflict with those ruling cases.

Not only was there "no requirement for presentation of a claim where the injury was caused by an intentional tort" (Respondents' Brief, pp. 17 and 43), but also this plaintiff teacher was exempted from the requirement for notice of her claim by the provisions of sections 926 of the Education Code, 703(d) of the Government Code, and 3601 of the Labor Code.

Said exemptions have been treated as of no consequence and are disregarded by this Court because of its erroneous holding that there was no abuse of discretion by the principals and because its opinion fails to distinguish between scope of employment and scope of authority (as shown in our Points II and III, *supra*). Oddly, said opinion argues first that the demurrer is sustained because no notice of claim was given (although it is shown that none was required), and then counterwise contends that in either event the supervisory authority of the principals entitled them to commit the willful torts of threat and duress against plaintiff teacher, thus weakly resting each of said untenable positions upon its opposite.

Said decision is in error by holding that a notice of claim against the principals was required, and therefore it denies due process.

To hold that the 1963 statutes, which provide a different mode of notice, are applicable to this action, is obviously incorrect. The statutes in effect at the time this action was commenced and when the cause of action accrued required notice only in cases of negligence, which is not the essence of this action. The moratorium statute of 1961 by its terms is not applicable to this case. At most if a notice were required it would not be the notice set forth in the 1963 statute but the notice constituted by the mere filing of this action in view of the fact that no notice was required at the time of the accrual of the action or at the time of the filing of the action.

See *Porter* v. *Bakersfield, etc., Electric Ry. Co.*, 36 Cal. 2d 582, 225 P.2d 223;

43 Cal. Jur. 2d 677, Note 16.

Whether or not notice of claim may be required in this case depends upon issues of fact, such as whether this is merely a case of negligence, exceeding scope of authority, a willful tort under the provisions of §3601 of the Labor Code, and whether the public entity is a co-conspirator with the principals in the commission of the torts. None of these issues can be decided upon judicial notice without the production of evidence, and the allegations of the complaint must be accepted as true. Moreover, judicial notice of the statute requiring notice of claim, as we have shown, does not apply here.

On an appeal from a judgment on demurrers the sole question is one of law whether the facts alleged in complaint are sufficient to state a cause of action or not and it is therefore error to assume facts other than those alleged in the complaint.

Tiedje v. *The Aluminum Paper Co.*, 46 Cal. 2d 450, 296 P.2d 554;

Lloyd v. *R.K.O. Pictures, Inc.*, 136 Cal. App. 2d 638, 289 P.2d 295;

Thatcher v. *The City Terrace Cultural Center*, 181 Cal. App. 2d 433, 5 Cal. Rep. 396;

Carrie v. *Bender*, 143 Cal. App. 2d 198, 300 P.2d 119.

POINT V

An Appeal Lies in This Case on the Grounds of Denial of Due Process of Law and of Equal Protection of Law by Reason of the Decision of the State Court of Last Resort Having Sustained the Demurrers to Plaintiff-Appellants' Complaint.

This case comes within the appellate jurisdiction of the United States Supreme Court to review decisions of state courts, in the particulars stated in Stern & Gressman's "Supreme Court Practice" (Third Edition), p. 67, to-wit:

> "In the setting of §1257(2), an appeal will lie even though the state court is not explicit in overruling a timely challenge on federal grounds to the validity of the state statute, although the challenge itself must be explicit. See Largent v. Texas, 318 U.S. 418. As long as the statute is sustained the court has necessarily rejected such an objection. Its silence in this respect is immaterial and cannot destroy the right to appeal under §1257(2)."

> "The validity of a state statute is also said to have been sustained, within the meaning of §1257(2), when the state court holds the statute applicable to a particular set of facts as against the contention that such an application is invalid on federal grounds, Dahnke-Salker Milling Co. v. Bondurent, 257 U.S. 282. This is true even though the statute on its face bears no federal impediment."

As we have shown in Statement of the Case, the federal question was presented in the allegations of Paragraph VIII of the first cause of action of the complaint and repeated by reference thereto in the subsequent causes of action. Also it was repeatedly called to the attention of the appellate court in plaintiff-appellants' briefs and petitions for hearing and rehearing. Moreover, the essence of appellants' action of tort for threat and duress is assertion of the fundamental right of liberty guaranteed and protected by the Fourteenth Amendment of the Constitution of the United States.

SUMMARY AND CONCLUSION

With the megalopolic growth of Metropolitan School Systems across this country has gone apace a tendency to administrative tyranny of school principals who, like those in this case, jealous of the superior learning developed by practice in the teachers under their authority, prefer mediocrity and servility in their staff of teachers, to the infinite detriment of education. It is, therefore, in the face of the facts alleged in plaintiff-appellants' complaint, sad to observe the tenderness expressed in the decision appealed from for the exercise of authority by the principals who committed that intentional and wilful tortious and criminal threat and duress in order to be rid of such a teacher.

The opinion of the District Court of Appeal somewhat understates the allegations of the complaint, but does not deny that its allegation of fact sufficiently allege the principals' commission of the tort of threat and duress against Mrs. Tietz. The decision attempts to avoid the tort by claiming immunity for the principals under the general statute declaring the principals' supervisory authority, and by assumming that the statutes requiring

notice of claims, which statute was enacted subsequent to the accrual and commencement of this action, bars it.

We have shown that under the California Teacher tenure acts the principals do not have authority to hire and fire teachers; that Mrs. Tietz had permanent tenure; that the tenure law gave her security and permanence in her position of librarian at the Narbonne School; that the principals' threat and duress to compel her to transfer to another school would reduce her position of seniority and threatened her tenure; that only the school board, subject to Superior Court warrant, had authority to remove, dismiss, or transfer her to another school.

In consequence, the principals' intentional and wilful threat and duress as alleged, was in violation of her constitutional right of liberty and property; and, therefore, the decision of the California Courts of last resort affirming the judgment of the Superior Court in sustaining the demurrers and dismissing plaintiffs' action, is a denial of due process and of equal protection of the law.

Accordingly, this appeal should be allowed and oral argument granted; and appellants' pray that it be the judgment of this Court that this case be remanded for trial with direction of judgment herein in favor of appellants.

Respectfully,

J. B. TIETZ
257 South Spring Street
Los Angeles, California
Attorney for Appellants

ARTHUR E. BRIGGS
Of Counsel

BLANK
PAGE

APPENDIX B

Veatch, Thomas, Carlson & Dorsey
3200 Wilshire Boulevard—Suite 10007
Los Angeles, California 90005
Telephone 381-2861
Attorneys for Defendants

(Filed April 23, 1964. William G. Sharp, County Clerk
By Kenneth Baird, Deputy)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOHNNIEMAE PATTERSON TIETZ AND J. B. TIETZ,
Plaintiffs,
vs.
MICHAEL J. MARIENTHAL, et al.,
Defendants.

No. SO C-5280
[Transferred to Los Angeles]

Order for Dismissal After Sustaining of Demurrer Without Leave to Amend.

Motion of Defendants Los Angeles Unified School District, Board of Education of the City of Los Angeles, Phyllis O. Morey, and Evelyn L. Marienthal for an order of dismissal upon the ground that their demurrer to plaintiffs' complaint had been sustained without leave to amend as to all alleged causes of action directed to them or to any of them, came on for hearing before me this 6th day of April, 1964, Veatch, Thomas, Carlson & Dorsey, by Wayne Veatch, appearing for the moving parties, and there being no appearance for the plaintiffs, and the court being fully advised in the premises, and good cause appearing therefor;

IT IS HEREBY ORDERED that said motion be, and the same is hereby, granted; that the above-entitled action be, and the same is hereby, dismissed as to said defendants.

DATED this 23 day of April, 1964.

Leon T. David
Judge

Veatch, Thomas, Carlson & Dorsey
3200 Wilshire Boulevard—Suite 10007
Los Angeles, California 90005
Telephone 381-2861
Attorneys for Defendants

(Filed May 4, 1964. William G. Sharp, County Clerk
By Kenneth Baird, Deputy)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOHNNIEMAE PATTERSON TIETZ AND J. B. TIETZ, Plaintiffs, vs. MICHAEL J. MARIENTHAL, et al., Defendants.	No. SO C-5280 [Transferred to Los Angeles]

Order for Dismissal After Sustaining of Demurrer

Motion of Defendants Michael J. Marienthal and Herbert E. Morey for an Order of Dismissal upon the ground that plaintiffs' complaint has not been amended within the time allowed by the Court following the sustaining of defendants' demurrers to plaintiffs' complaint, came on for hearing before me this 29th day of April, 1964, Veatch, Thomas, Carlson & Dorsey, by Wayne Veatch, appearing for the moving parties, and there being no appearance for the plaintiffs, and the court being fully advised in the premises, and good cause appearing therefor;

IT IS HEREBY ORDERED that said motion be, and the same is hereby granted; that the above-entitled action be, and the same is hereby dismissed as to said defendants.

DATED this 14th day of May, 1964.

Leon T. David
Judge of the Superior Court

APPENDIX C

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT DIVISION TWO

(Filed in the District Court of Appeal, Second District, December 21, 1965. J. T. Alley, Clerk.)

JOHNNIEMAE PATTERSON TIETZ, et al.,
Plaintiffs and Appellants,
vs.
LOS ANGELES UNIFIED SCHOOL DISTRICT, et al.,
Defendants and Respondents.
} Civil No. 28786

Appeal from judgments of the Superior Court of Los Angeles County. Leon T. David, Judge. The judgments are affirmed.

Arthur E. Briggs and J. B. Tietz, for Plaintiffs and Appellants.

Harold W. Kennedy, County Counsel, Veatch, Thomas, Carlson & Dorsey, and Henry F. Walker, for Defendants and Respondents.

Plaintiff herein, JohnnieMae Patterson Tietz, is a certificated teacher and certificated librarian and for more than ten years prior to April 7, 1962, was employed as and was acting as the librarian of the Nathaniel Narbonne High School, a senior high school in what is currently termed Los Angeles Unified School District. In various causes of action she alleges and prays for damages in excess of $500,000. Plaintiff J. B. Tietz is the husband of Johnnie-Mae and joins in the complaint in some of the causes of action and alleges and prays for total damages in the sum of $33,590.39. Both plaintiffs also pray for punitive damages, but do not name the amount. Both plaintiffs will hereinafter sometimes be referred to as appellants.

This appeal is taken from judgments of dismissal after sustaining the demurrers of respondents Los Angeles Unified School District, Board of Education of the City of Los Angeles (herein called "public school agencies"), and respondents Evelyn L. Marienthal, Phyllis O. Morey (herein called "wives") without leave to amend, and from judgments of dismissal after sustaining the demurrer of respondents Michael J. Marienthal and Herbert E. Morey (herein called "principals") with leave to amend, appellants having failed to amend within the allotted time. The public school agencies and the wives had demurred to two previous complaints, and all parties demurred to the second amended complaint after which judgment was entered.

The allegations of all causes of action in the complaint aside from the element of damage, referred to in the different causes of action, are substantially the same.

Mrs. Tietz had permanent tenure as a teacher and a librarian at Narbonne High School in Los Angeles. Principals Michael Marienthal and Herbert Morey were vice-principal and principal, respectively of Narbonne. During

the first quarter of 1962 principals threatened appellant in order to induce her to transfer to another school. The threats were made pursuant to a plan to coerce by threats and duress teachers with seniority greater than that of the principals to transfer from Narbonne. In March of 1962, the principals interviewed Mrs. Tietz and stated that her application for a sabbatical had been approved but that on her return "We advise you to transfer." In reply to Mrs. Tietz's request for reasons "they [principals] falsely stated to her that certain supervisors had given bad reports and ratings of her work, * * *." In addition, principals "grilled her with accusatory questioning of her work as librarian, and pretending to use a number of 3 x 5 cards which were in their hands and falsely claiming that each represented in detail a reported transgression or dereliction of her duties as librarian and teacher; * * *."

Mrs. Tietz's complaint alleges further that she had a fine record, no prior difficulty and that "said claims, which threatened grounds for discipline, dismissal or removal of [appellant] from her said position * * *" were known to be false by the principals and intended to harm her. She asserts mental distress and physical injury, and prays for general and special damages. J. B. Tietz, her husband, also asked for general and special damages.

The public school agencies were named as defendants in addition to the principals, on the theories of *respondeat superior*, and negligence in hiring the principals. The wives of the principals were named defendants as co-conspirators, with their husbands. We find nothing in any of the causes of action to sustain a theory of conspiracy. The judgment of dismissal entered upon a demurrer sustained without leave is proper. This facet of the litigation will be further treated (*infra*).

The sole issue before us insofar as the principals are concerned, is whether the principals functioned within a discretion inherently or by law made a part of their respective positions.

Severing the ultimate facts alleged in the complaint from conclusions and recitals therein, there is no doubt in our minds that the principals were performing the functions and assuming the responsibilities for which they are employed.

The State Board of Education has promulgated certain rules for the government of the public schools in this state, among which are the following, found in the California Administrative Code, title 5:

Article 3, Section 16: "Responsibility of Principal. The principal is responsible for the supervision and administration of his school."

Article 8.7, Section 78.9: "Functions of Certain Administrative and Supervisory Positions in School Districts."

* * *

"(m) Principal. A position entitled 'principal' * * * has the following function: To serve * * * as chief executive officer of one or more schools with *total responsibility* to manage all affairs of the school, including *general control and supervision of all certificated and classified employees* assigned to serve in the school [Emphasis added].

"(n) Vice-Principal. A position entitled 'vice-principal' * * * has the following functions:

"(1) To perform for the principal such duties of the principal as the latter may delegate to him. * * *"[1]

1. Appellants themselves allege on information and belief that "said aforedescribed wrongful conduct of defendants Michael J. Marienthal and Herbert E. Morey was within the scope of their duties".

The law of governmental immunity, as it applies to both governmental agencies and officials, is stated in *Lipman* v. *Brisbane Elementary School District*, 55 Cal. 2d 224, at p. 229: "In *Muskopf* v. *Corning Hospital District*, *ante*, p. 211, we held that the rule of governmental immunity may no longer be invoked to shield a public body from liability for the torts of its agents who acted in a ministerial capacity. But it does not necessarily follow that a public body has no immunity where the discretionary conduct of governmental officials is involved. While, as pointed out in the Muskopf case, a governmental agent is personally liable for torts which he commits when acting in a ministerial capacity, a different situation exists with respect to discretionary conduct. Because of important policy considerations, the rule has become established that government officials are not personally liable for their discretionary acts within the scope of their authority even though it is alleged that their conduct was malicious. (*Hardy* v. *Vial*, 48 Cal. 2d 577, 582-584; *Coverstone* v. *Davies*, 38 Cal. 2d 315, 322; *White* v. *Towers*, 37 Cal. 2d 727, 730-732; see *Barr* v. *Matteo*, 360 U.S. 564, 569, et seq.) The subjection of officials, the innocent as well as the guilty, to the burden of a trial and to the danger of its outcome would impair their zeal in the performance of their functions, and it is better to leave the injury unredressed than to subject honest officials to the constant dread of retaliation (*Hardy* v. *Vial*, 48 Cal. 2d 577, 582-583)."

The court in the *Lipman* case points out: "[T]his rule applies not only to acts essential to the accomplishment of the main purposes for which the office was created but also to acts which, although only incidental and collateral, serve to promote those purposes (*White* v. *Towers*, 37 Cal.2d 727, 733)." (Id. at p. 233; see also *Elder* v. *Anderson*, 205 Cal. App. 2d 326, 333).

If appellant's work had indeed been unsatisfactory, it is obvious that respondent principals would have been acting within the scope of their duties in conducting an interview in which appellant was taken to task. Assuming arguendo that the conduct alleged goes beyond the bounds of permissible personnel supervision and proper discretion, to allow an action of this nature to be maintained for the purpose of determining the truth of allegations which contest and challenge the propriety used in the exercise of a discretion which exists, would be to frustrate the very purpose of the immunity. In this respect we quote the oft-repeated words of Judge Learned Hand in *Gregoire* v. *Biddle,* 177 F.2d 579, 581: "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties * * *". We hold, therefore, that the second amended complaint failed to state a cause of action against the respondent principals, who were immune from suit, and that the judgments of dismissal in favor of principals following appellant's failure to amend, were proper (C.C.P. §581(3)).

The governmental immunity of the public school agencies is governed by other principles of law. In *Lipman* v. *Brisbane Elementary School District, supra,* the court at pp. 229-230 says: "The immunity of the agency from liabil-

ity for discretionary conduct of its officials, however, is not coextensive with the immunity of the officials in all instances. (See 3 Davis, Administrative Law Treatise (1958), 482-505, 542-544; 2 Harper and James, The Law of Torts, 1640-1642, 1657-1665; Hall and Wigmore, *Compensation for Property Destroyed to Stop the Spread of Conflagration* (1907), 1 Ill. L. Rev. 501, 514 et seq.). The danger of deterring official action is relevant * * * but not decisive of that issue. It is unlikely that officials would be as adversely affected in the performance of their duties by the fear of liability on the part of their employing agency as by the fear of personal liability. The community benefits from official action taken without fear of personal liability, and it would be unjust in some circumstances to require an individual injured by official wrongdoing to bear the burden of his loss rather than distribute it throughout the community * * *."

Nevertheless we need not decide whether, in the present case, governmental immunity should attach to the respondent public school agencies, for we determine that appellant has failed to state a cause of action against them on other grounds.

Government Code Section 905[2] provides: "There shall be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of this part *all claims for money or damages* against local public entities except:

"* * *

"(d) Claims for which the workmen's compensation authorized by Division 4 (commencing with Section 3201)

2. Added by Stats 1963 ch 1715 sec. 1. At the time the alleged cause of action accrued it was Government Code sec 703, in substantially the same form.

of the Labor Code is the *exclusive remedy.*" (Emphasis added.)

Government Code Section 945.4[3] provides: "* * * no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented * * * until a written claim therefor has been presented to the public entity * * *."

The cases establish without question that failure to file such a claim is fatal to the cause of action. (*Redlands High School District* v. *Superior Court,* 20 Cal. 2d 348, 358 and cases cited therein; *Kornahrens* v. *City & County of San Francisco,* 87 Cal. App. 2d 196). Appellant's failure to allege that such a claim was presented subjected the complaint to a general demurrer. (*Dias* v. *Eden Township Hospital District,* 57 Cal. 2d 502).

Appellants argue, however, that Sections 905 and 945.4 of the Government Code do not require the presentation of claims based on intentional torts, but are restricted to suits for negligence. We see no basis for such a construction. The sections involved require the presentation of a claim "for money or damages" which on its face includes actions for either negligence or intentional torts. Moreover, the predecessors of these sections were placed in the Government Code in 1959 in substantially the same form as they exist today. At the same time Section 801[4] was added to the Government Code, which read: "Whenever it has been claimed that any person has been injured or any property damages as a *result of the negligence or carelessness* of any public officer or employee occurring during the course of his service or employment * * * [a verified claim must

3. Added by Stats 1963 ch 1715 sec 2. At the time the alleged cause of action accrued, it was Government Code sec 710 in substantially the same form.

4. Repealed by Stats 1963 ch 1715 sec 6.

be presented]." (Emphasis added). While the preceding section referred only to public officers or employees, it contains limiting language, which, when compared to the broad language of the sections in dispute promulgated at the same time and within the same statutory scheme, conclusively demonstrates that it was the intention of the Legislature to include claims for intentional torts within the phrase "claims for money or damages".

Appellants also contend that their claim is excepted from the requirement of presentation by the language of Section 905(d), *supra*, which refers to claims for which workmen's compensation is the "exclusive remedy". This argument, however, proves too much. For if the nature of appellants' action is such that the workmen's compensation law is the exclusive remedy, then they have no common law rights to pursue in the superior court (see *Alaska Packers Assn.* v. *Industrial Accident Commission*, 200 Cal. 579, 583, aff'd 276 U.S. 467; *Bartlett Hayward Co.*, 203 Cal. 522, 535; *Scott* v. *Industrial Accident Commission*, 46 Cal. 2d 76, 85), and the demurrer must be sustained for lack of jurisdiction.

It is to be noted that the demurrer of the public school agencies to appellants' second amended complaint was sustained without leave to amend. This was not an abuse of discretion, however, since two prior complaints had been struck down on the ground that appellants failed to allege the required presentation of the claim. Obviously, appellants could not truthfully allege that they had complied with this prerequisite, and leave for further amendment would have been a fruitless gesture. (*Johnson* v. *Ehrgott*, 1 Cal. 2d 136, 138; *Ruinello* v. *Murray*, 36 Cal. 2d 687, 690; *Willson* v. *Security-First National Bank*, 21 Cal. 2d 705, 711).

The final issue in the case at bench is whether the court acted properly in sustaining the demurrer of the wives without leave to amend. Appellants' sole ground for joining them in this action is that they "did * * * aid, abet and conspire with said defendants principal and vice-principal in their aforesaid acts and plans * * *." As stated in *Agnew* v. *Parks,* 172 Cal. App. 2d 756, at p. 762: "The long-established rule that a conspiracy, in and of itself, however atrocious, does not give rise to a cause of action unless a civil wrong has been committed resulting in damage (*Herron* v. *Hughes,* 25 Cal. 555) requires a determination of whether the pleaded facts show something was done which, without the conspiracy, would give rise to a right of action (*Orloff* v. *Metropolitan Trust Co.,* 17 Cal. 2d 484; *Mox Incorporated* v. *Woods,* 202 Cal. 675; *Schafer* v. *Berinstein,* 140 Cal. App. 2d 278; *Perry* v. *Meikle,* 102 Cal. App. 2d 602). The only purpose of the pleader in employing a conspiracy is to link together and make equally liable with him who carries out the scheme one who has agreed to a common design to commit a wrong (*Mox Incorporated* v. *Woods,* 202 Cal. 675)."

In the present case, no right of action is stated against the actual perpetrators of the alleged wrong, and no facts are pleaded showing any direct action by the conspirators. As it appears from the complaint, the only conduct of the wives which would subject them to liability is that they aided, abetted and conspired, in some mysterious way, with their husbands in order to harm the appellants. If no cause of action is stated against the husbands, it seems only too obvious that the mere act of conspiracy, without more, would not be actionable against the wives. (Cf. *Hardy* v. *Vial,* 48 Cal. 2d 577, 584, where the conduct of the co-conspirator as alleged, gave rise to a cause of action against him independent of the conspiracy).

We hold, therefore, that the judgments of dismissal were properly entered, and are affirmed.

Roth, P.J.

We concur:

Herndon, J.

Fleming, J.

APPENDIX D

California Labor Code

§3601. Exclusive remedy; additional remedy in event of death.

(a) Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in Section 3706, the exclusive remedy for injury or death of an employee against the employer or against any other employee of the employer acting within the scope of his employment, except that an employee, or his dependents in the event of his death, shall, in addition to the right to compensation against the employer, have a right to bring an action at law for damages against such other employee, as if this division did not apply, in the following cases:

(1) When the injury or death is proximately caused by the willful and unprovoked physical act of aggression of such other employee.

(2) When the injury or death is proximately caused by the intoxication of such other employee.

(3) When the injury or death is proximately caused by an act of such other employee which evinces a reckless disregard for the safety of the employee injured, and a calculated and conscious willingness to permit injury or death to such employee.

(b) An act which will not sustain an independent action for damages against such other employee under subsections (1), (2) or (3) of subdivision (a) of this section may nevertheless be the basis of a finding of serious and willful misconduct under Section 4553 or 4553.1, if (1) such other employee is established to be one through whom the employer may be charged under Section 4553; (2) such act of such other employee shall be established to have been the proximate cause of the injury or death; and (3) such act is established to have been of a nature, kind, and degree sufficient to support a finding of serious and willful misconduct under Section 4553 or 4553.1.

(c) In no event, either by legal action or by agreement whether entered into by such other employee or on his behalf, shall the employer, be held liable, directly or indirectly, for damages awarded against, or for a liability incurred by such other employee under subsections (1), (2) or (3) of subdivision (a) of this section.

(d) No employee shall be held liable, directly or indirectly, to his employer, for injury or death of a coemployee except where the injured employee or his dependents obtain a recovery under subdivision (a) of this section. (As amended Stats. 1959, c. 1189, p. 3275, §1.)

BLANK
PAGE

(b) An act which will not sustain an independent action for damages against such other employee under subsections (1), (2) or (3) of subdivision (a) of this section may nevertheless be the basis of a finding of serious and willful misconduct under Section 4553 or 4553.1, if (1) such other employee is established to be one through whom the employer may be charged under Section 4553; (2) such act of such other employee shall be established to have been the proximate cause of the injury or death; and (3) such act is established to have been of a nature, kind, and degree sufficient to support a finding of serious and willful misconduct under Section 4553 or 4553.1.

(c) In no event, either by legal action or by agreement whether entered into by such other employee or on his behalf, shall the employer, be held liable, directly or indirectly, for damages awarded against, or for a liability incurred by such other employee under subsections (1), (2) or (3) of subdivision (a) of this section.

(d) No employee shall be held liable, directly or indirectly, to his employer, for injury or death of a coemployee except where the injured employee or his dependents obtain a recovery under subdivision (a) of this section. (As amended Stats. 1959, c. 1189, p. 3275, §1.)

BLANK PAGE

BLANK PAGE

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 24 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. [redacted] 217

JOHNNIEMAE PATTERSON TIETZ, *et al.*,

Appellants,

vs.

MICHAEL J. MARIENTHAL, *et al.*,

Appellees.

On Appeal From the District Court of Appeal of the State of California, Second Appellate District.

APPELLEES' MOTION TO DISMISS.

HAROLD W. KENNEDY,
County Counsel,
VEATCH, THOMAS, CARLSON & DORSEY,
WAYNE VEATCH,
Suite 1007,
3200 Wilshire Boulevard,
Los Angeles, Calif. 90005,
and
HENRY F. WALKER,
Suite 806,
615 South Flower Street,
Los Angeles, Calif. 90017,
Counsel for Appellees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

BLANK
PAGE

SUBJECT INDEX

	Page
Statement of the case	2
Argument	4
I.	
Lack of substantial federal question; state court decision predicated on non-federal basis; no federal question passed on by state court decision	4
a. As to appellee school principals	4
b. As to appellee wives	8
c. As to appellee school agencies	9
II.	
Appellant's failure timely or properly to raise federal question	13
Conclusion	22

TABLE OF AUTHORITIES CITED

Cases	Page
Abraham v. Sims, 2 Cal.2d 698, 42 P.2d 1029	7
Ahrensfeld v. State Board of Education, 126 N.J.L. 543, 19 A.2d 656	20
Atlas Terminals, Inc. v. Sokol, 203 Cal.App.2d 191, 21 Cal.Rptr. 293	17
Bank of America v. Frost, 205 Cal.App.2d 614, 23 Cal. Rptr. 441	17, 19
Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335, 3 L.ed. 2d 1434	7
Bautista v. Jones, 25 Cal.2d 746, 155 P.2d 343	20
Blackman v. Kristovich, 216 Cal.App.2d 792, 31 Cal. Rptr. 413	17
Brown v. Coffee, 17 Cal.App. 381, 121 Pac. 309	22
Dias v. Eden Township Hospital Dist., 57 Cal.2d 502, 20 Cal.Rptr. 630, 370 P.2d 334	10
Epperson v. Rosemond, 100 Cal.App.2d 344, 233 P.2d 655, 224 P.2d 480	20, 21
Esberg v. Badaracco, 202 Cal. 110, 259 Pac. 730	9
Farnsworth v. Cote, 199 Cal.App.2d 762, 19 Cal. Rptr. 45	11
Garter v. Metzdorf Associates, 217 Cal.App.2d 812, 32 Cal.Rptr. 113	17
Gould v. Richmond School Dist., 58 Cal.App.2d 497, 136 P.2d 864	9
Gregoire v. Biddle, 177 F.2d 579	6, 7
Hardy v. Vail, 48 Cal.2d 577, 311 P.2d 494	6
Herndon v. Georgia, 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530	14

Page

Hogan v. Miller, 153 Cal.App.2d 107, 314 P.2d 230 .. 17

Kelso v. Board of Education, 42 Cal.App.2d 415, 109 P.2d 29 9

Kennedy v. Miller, 97 Cal. 429, 32 Pac. 558 9

Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 5

Matthews v. Board of Education, 198 Cal.App.2d 748, 18 Cal.Rptr. 101 7

Mitchell v. Board of Trustees, 5 Cal.App.2d 64, 42 P.2d 397 7

Muskopf v. Corning Hospital Dist., 55 Cal.2d 211, 11 Cal.Rptr. 89, 359 P.2d 457 10

Nemo v. Farrington, 7 Cal.App. 443, 94 Pac. 874 22

Newell v. Brawner, 140 Cal.App.2d 523, 295 P.2d 460 19

People ex rel. Dept. Public Works v. Garden Grove Farms, 231 Cal.App.2d 666, 42 Cal.Rptr. 118 18

People ex rel. Dept. of Public Works v. Mascotti, 206 Cal.App.2d 772, 23 Cal.Rptr. 846 20

Redlands High School Dist. v. Superior Court, 20 Cal.2d 348, 125 P.2d 490 10

Rock Island, Arkansas & Louisiana Railroad Co. v. United States, 254 U.S. 141, 41 S.Ct. 55, 65 L. Ed. 188 10

Scott v. Industrial Acc. Com., 46 Cal. 2d 76, 293 P.2d 18 12

Skelly v. School Dist., 103 Cal. 652, 37 Pac. 643 9

Sobey v. Molony, 40 Cal.App.2d 381, 104 P.2d 868 .. 10

Superior Court of the State of California v. Evans, 309 U.S. 640, 60 S.Ct. 893, 84 L.Ed. 995 14

Page

Texas & P. Ry. Co. v. Brotherhood of R. Trainmen, 63 F.Supp. 640, 159 Fed. 2d 822 20

Tietz v. Los Angeles Unified School District, 238 Adv. Cal.App. 1028, 48 Cal.Rptr. 245 2

Utz v. Aureguy, 109 Cal.App.2d 803, 241 P.2d 639 .. 19

Ward v. San Diego School Dist., 203 Cal. 712, 265 Pac. 821 9

Wayne v. Bureau of Private Investigations & Adjusters, 201 Cal.App.2d 427, 20 Cal.Rptr. 194 10

Whitson v. LaPay, 153 Cal.App.2d 584, 315 P.2d 45 11

Rules

Revised Rules of the United States Supreme Court, Rule 16(1)(b) 1, 22

California Rules of Court, Rule 13 14

California Rules of Court, Rule 14(a) 14

California Rules of Court, Rule 15 14

California Rules of Court, Rule 22 15

California Rules of Court, Rule 24 15

California Rules of Court, Rule 27 15

California Rules of Court, Rule 28 15

California Rules of Court, Rule 28(c) 15

California Rules of Court, Rule 29(b) 15, 21, 22

Statutes

California Constitution, Article I, Sec. 1 20

California Constitution, Article I, Sec. 13 20

California Constitution, Article I, Sec. 21 20

California Constitution, Article IV, Sec. 25 20

California Education Code, Sec. 13274 7

	Page
California Education Code, Sec. 13278	7
California Government Code, Sec. 703(d)	11
California Government Code, Sec. 710	9
California Government Code, Sec. 905(d)	11
California Government Code, Sec. 945.4	9
California Labor Code, Sec. 3601	11
California Statutes of 1959, ch. 1724	9
California Statutes of 1961, ch. 1404, Sec. 4	9
California Statutes of 1963, ch. 1715, Sec. 2	9
California Statutes of 1963, ch. 1715, Sec. 152(b)	9
United States Constitution, Fourteenth Amendment	14, 20

Textbooks

77 American Law Reports 2d, p. 336	10
43 California Jurisprudence 2d, Sec. 56 pp. 628-629	9
Stern & Gressman's "Supreme Court Practice" (3rd ed.), p. 97	15

BLANK
PAGE

IN THE

Supreme Court of the United States

October Term, 1965

No. 1399

JOHNNIEMAE PATTERSON TIETZ, *et al.*,

Appellants,

vs.

MICHAEL J. MARIENTHAL, *et al.*,

Appellees.

On Appeal From the District Court of Appeal of the State of California, Second Appellate District.

APPELLEES' MOTION TO DISMISS.

Pursuant to subdivision 1(b) of Rule 16, Revised Rules of this Court, appellees move to dismiss the appeal on grounds therein specified, to-wit:

1. That the appeal does not present a substantial federal question;

2. That the judgment rests on an adequate non-federal basis;

3. That any federal question sought to be reviewed was not timely or properly raised, or expressly passed on.

Statement of the Case.

The appeal is from the decision rendered by the District Court of Appeal of the State of California, Second Appellate District, on December 21, 1965, and reported as *Tietz v. Los Angeles Unified School District*, 238 Adv. Cal.App. 1028, 48 Cal.Rptr. 245. The California District Court denied appellants' petition for rehearing on January 6, 1966. The California Supreme Court unanimously denied appellants' petition for hearing by that court on February 16, 1966. Copy of the California District Court's decision appears as Appendix C to the Jurisdictional Statement. (JSA 3-13.)[1]

Appellant, Mrs. Tietz, was a public school teacher in a school of which Mr. Morey was principal and Mr. Marienthal was vice-principal, hereafter referred to as "principals". Claiming that these principals "within the scope of their duties" (JSA 6, fnt. 1) sought by threats concerning the caliber of her work as teacher-librarian to coerce her to transfer from said school and that this caused her mental distress with resultant physical injury, an action for damages therefor was instituted by her with her husband, Mr. Tietz, joining as plaintiff and seeking consequential damages on his part. Defendants (appellees) were public school agencies (Los Angeles Unified School District and Board of Education of the City of Los Angeles), the principals, and the latters' respective wives. (JSA 4-5 for full statement of facts and claims made by appellants' pleadings.)

---

[1]The Jurisdictional Statement will be cited as "JS" and the appendix thereto as "JSA", respectively followed by appropriate page references.

A reading of appellants' Jurisdictional Statements may leave the misapprehension that appellant Mrs. Tietz had been wrongfully dismissed or discharged from her teaching position. She had never been dismissed or discharged. There was never any deprivation of any tenure or seniority right and the second amended complaint makes no claim to the contrary. Appellants' pleading claimed that defendant principals within the scope of their duties by threatening disciplinary action sought to coerce her to seek a transfer from the particular school and that this caused her mental distress resulting in physical injury for which appellants sought damages. She did not seek to be transferred; she was never transferred; and no change or impairment ever occurred in any tenure or seniority right possessed by her.

Demurrers of defendant public school agencies and said wives were sustained with leave to amend to appellants' original complaint and appellants' first amended complaint. Demurrers of these defendants to appellants' second amended complaint were sustained without leave to amend and judgment of dismissal was rendered. Demurrer of defendant principals to appellants' second amended complaint was sustained with leave to amend; appellants did not amend within the allotted time; and judgment of dismissal was rendered. (JSA 4.) Appellants appealed to the California District Court of Appeal from said judgments of dismissal. (Ibid.)

ARGUMENT.

I.

Lack of Substantial Federal Question; State Court Decision Predicated on Non-Federal Basis; No Federal Question Passed on by State Court Decision.

A reading of the decision of the California District Court (JSA 3-13) instantly reveals that no federal question was therein mentioned or considered or passed upon but that the decision was predicated solely upon a non-federal basis.[2] Appellants sought recovery of personal injury and consequential damages allegedly caused by asserted tortious act or conduct of appellee school principals in the scope of their duties and employment by appellee school agencies. The California District Court held that appellants had stated no cause against any of the appellees and affirmed the trial court's judgments of dismissal of the action, all on the basis of applicable California law and decisions. There can be no claim that appellants' asserted cause for said damages arose under or by virtue of any federal statute or rule or federal constitutional provision. It is simply an action for damages for alleged tort. Whether such action is countenanced under California law and decisions, is a question of state, not federal, concern. The decision rests entirely upon non-federal bases.

a. As to Appellee School Principals.

Contrary to any intimation or assertion contained in appellants' Jurisdictional Statement, the California District Court did not predicate its decision as to appellee

---

[2]That appellants did not raise timely or properly any claimed federal question is the subject of discussion under the second and concluding main heading, *infra*, hereof.

school principals upon the basis of failure of appellants to file or present any claim as a prerequisite to suit. Affirmance of the judgment of dismissal insofar as concerns appellee school principals was based on the fact that they were the administrative executive officers of the school, responsible for the supervision and administration of the school, with total responsibility to manage all affairs of the school, including general control and supervision of all certified and classified employees assigned to serve in the school; that as such executive officers they are endowed with discretion in these respects inherently or by law made a part of their position as school principals; and that, if appellant teacher's work had been unsatisfactory, appellee school principals would be acting within the scope of their duties in taking her to task. (JSA 6 and 8.) It was held that, under established California decision (quoting from *Lipman v. Brisbane Elementary School Dist.* (1961), 55 Cal.2d 224, 229, [11 Cal. Rptr. 97, 359 P.2d 465]), there is no liability in California on the part of government officials for discretionary acts committed in the scope of their authority. Among that quoted from *Lipman* was (JSA 7):

> "'. . . While, as pointed out in the Muskopf case (*Muskopf v. Corning Hospital Dist.* (1961), 55 Cal.2d 211 [11 Cal.Rptr. 89, 359 P.2d 457]), a governmental agent is personally liable for torts which he commits when acting in a ministerial capacity, a different situation exists with respect to discretionary conduct. Because of important policy considerations, the rule has become established that government officials are not personally liable for their discretionary acts within the scope of their authority even though it is alleged that

their conduct was malicious. (*Hardy v. Vial,* 48 Cal.2d 577, 582-584 [311 P.2d 494]; *Coverstone v. Davies,* 38 Cal.2d 315, 322 [239 P.2d 876]; *White v. Towers,* 37 Cal.2d 727, 730-732 [235 P. 2d 209, 28 A.L.R.2d 636]; see *Barr v. Matteo,* 360 U.S. 564, 569, et seq. [79 S.Ct. 1335, 3 L.Ed. 2d 1434].) The subjection of officials, the innocent as well as the guilty, to the burden of a trial and to the danger of its outcome would impair their zeal in the performance of their functions, and it is better to leave the injury unredressed than to subject honest officials to the constant dread of retaliation. *(Hardy v. Vial,* 48 Cal.2d 577, 582-583 [311 P.2d 494].)'

"The court in the *Lipman* case points out: '[T]his rule applies not only to acts essential to the accomplishment of the main purposes for which the office was created but also to acts which, although only incidental and collateral, serve to promote those purposes. (*White v. Towers,* 37 Cal.2d 727, 733 [235 P.2d 209, 28 A.L.R.2d 636].)'. . ."

The doctrine of absolute immunity of governmental officials, such as appellee school principals, in the exercise of discretion in connection with and scope of their duties or employment, is firmly established as part of California law. (*Hardy v. Vail* (1957), 48 Cal.2d 577, 582-584, 311 P.2d 494.) On page 582 of *Hardy,* it was said: "The policy underlying the doctrine of absolute immunity is well stated by Judge Learned Hand in *Gregoire v. Biddle,* 177 F.2d 579, 581, as follows:", the California Supreme Court then quoting from *Gregoire* including that which the California District Court here quoted in part from *Gregoire.* (JSA 8.) This

Court, referring to *Gregoire* and quoting extensively therefrom, stated that, "The matter has been admirably expressed by Judge Learned Hand:" (*Barr v. Matteo* (1959), 360 U.S. 564, 571-572, 79 S.Ct. 1335, 3 L.Ed. 2d 1434.)

The California District Court here applied California public policy, granting immunity from liability to governmental employees, positioned such as appellee principals, for discretionary acts or conduct in their supervisorial duties or functions.[8] Obviously, no federal question is involved therein and that court's decision thereon is predicated on a non-federal basis.

---

[8]It is difficult to follow appellants' argument in their Jurisdictional Statement anent teacher-tenure status; statutory methods of disciplinary charges; and the like. Appellant teacher-librarian's qualifications and tenure rights as such teacher-librarian were not the same as appellee principals' because the latter (to have been appointed to position of principal) were required to possess different and additional qualifications. (Cal. Education Code, §§13274, 13278.) Her tenure status or rights did not invest her with tenure or rights in any particular school, class or room. (*Matthews v. Board of Education* (1962), 198 Cal.App.2d 748, 754 [5], 18 Cal.Rptr. 101, "The assignment of teachers to classes for which a teacher is certified is entirely within the discretion of the governing board. A teacher does not acquire tenure in a particular class or room. She is assigned to duty within the scope of her certification wherever she is needed in the schools of the district. [Citations.]"; *Mitchell v. Board of Trustees* (1935), 5 Cal.App.2d 64, 69, 42 P. 2d 397, "A teacher, in acquiring a permanent status, does not thereby acquire a vested right to teach in any certain class or in any certain school."; see also *Abraham v. Sims* (1935), 2 Cal.2d 698, 711 [3], 42 P.2d 1029.) By transferring to another school within the district she would not and could not lose any seniority or tenure right. As part of their control and supervision over teachers assigned in the school (JSA 6), it patently was within the duties of the employment of appellee principals for the latter to take teachers in the school to task for unsatisfactory work (JSA 8) and their request that she seek a transfer to another school, if she acceded thereto, would not have caused any change whatever in her tenure status. It further

b. As to Appellee Wives.

The Jurisdictional Statement makes no claim that the California District Court erred in affirming the judgment of dismissal as to appellee wives. As stated in the California District Court's opinion (JSA 12):

> ". . . Appellants' sole ground for joining them in this action is that they 'did * * * aid, abet and conspire with said defendant principal and vice-principal in their aforesaid acts and plans * * *.'
>
> . . .
>
> "In the present case, no right of action is stated against the actual perpetrators of the alleged wrong, and no facts are pleaded showing any direct action by the conspirators. As it appears from the complaint, the only conduct of the wives which would subject them to liability is that they aided, abetted and conspired, in some mysterious way, with their husbands in order to harm the appellants. If no cause of action is stated against the husbands, it seems only too obvious that the mere act of conspiracy, without more, would not be actionable against the wives . . ."

Clearly, no federal question arises or exists thereunder and the California District Court's decision thereon is predicated on a non-federal basis.

---

was the principal's province to report, in their discretion any unsatisfactory or other dereliction in work of teachers in the school—for disciplinary or such other action as might be taken in connection therewith. The arguments of appellants in their Jurisdictional Statement are contrary to and unsupported by California law in the foregoing respects and serve but to confuse. They do not establish any right of action against appellee principals in view of the public policy of California granting immunity to such officials under the rules of law discussed and followed in the California District Court's decision.

c. As to Appellee School Agencies.

In California, the appellee school agencies are state agencies, political subdivisions of the state designed for the promotion of the general educational purposes of the state. (*Kennedy v. Miller* (1893), 97 Cal. 429, 432, 32 Pac. 558; *Skelly v. School Dist.* (1894), 103 Cal. 652, 658, 37 Pac. 643; *Esberg v. Badaracco* (1927), 202 Cal. 110, 115, 117, 259 Pac. 730; *Ward v. San Diego School Dist.* (1928), 203 Cal. 712, 715, 265 Pac. 821; *Kelso v. Board of Education* (1941), 42 Cal.App.2d 415, 109 P.2d 29; *Gould v. Richmond School Dist.* (1943), 58 Cal.App.2d 497, 502, 136 P.2d 864.) As expressed in 43 Cal.Jur.2d, Schools, §56, pp. 628-629:

> "Since the state discharges some of its governmental functions relating to education through school districts, such districts are state agencies. They are political subdivisions of the state designed for the promotion of the general educational purposes of the state. They are agencies of the state for the local operation of the state school system. They are independent and separate governmental agencies distinct from the counties and cities in which they are situated."

In California, the consent of the state for suit against it or its agencies or political subdivisions has attached to it as a prerequisite to suit the filing of a claim with the governmental body being sued. This requirement existed at the time of the alleged tort (Cal. Gov't Code, §710, Stats. 1959, ch. 1724) expressly continued in existence by Cal.Stats. 1961, ch. 1404, §4, and now found in substantially the same form in Cal. Government Code, section 945.4, Cal. Stats. 1963, Ch. 1715, §2. (See also Cal. Stats. 1963, ch. 1715, §152, sub. (b).)

Contrary to appellants' statement, the California statutes at all times have required the filing of such claim with the governmental agency where claim for money or damages is being made against such agency. There was no "retroactive" application of the requirement for filing of such claim with the appellee school agencies. That requirement at all times existed. (See, *Sobey v. Molony* (1940), 40 Cal. App. 2d 381, 385, 104 P. 2d 868; *Wayne v. Bureau of Private Investigations & Adjusters* (1962), 201 Cal. App. 2d 427, 439, 20 Cal. Rptr. 194; Anno. 77 A.L.R. 2d 336.)

In *Dias v. Eden Township Hospital Dist.* (1962), 57 Cal.2d 502, 503, 20 Cal.Rptr. 630, 370 P.2d 334, it was held: "There is no merit to plaintiffs' argument that our decision in *Muskopf v. Corning Hospital Dist.*, 55 Cal.2d 211 [11 Cal.Rptr. 89, 359 P.2d 457], in effect eliminated the requirement for presentation of claims as a condition to the maintenance of actions against public entities." It is established California law that, in an action against a public entity, presentment of a claim is required and failure to do so is fatal to the action (*Redlands High School Dist. v. Superior Court* (1942), 20 Cal.2d 348, 358, 125 P.2d 490, and cases cited), subjecting to general demurrer a complaint which fails to allege compliance with this requirement. (*Dias v. Eden Township Hospital Dist., supra,* 57 Cal.2d 502.) "Men must turn square corners when they deal with the government. If it attaches even purely formal conditions to its consent to be sued, those conditions must be complied with." (*Rock Island, Arkansas & Louisiana Railroad Co. v. United States* (1920), 254 U.S. 141, 142, 41 S.Ct. 55, 65 L.Ed. 188.)

Appellants profess to claim that California requires no filing of a claim where the tort is alleged to be in-

tentional. That was not the law at the time of the event (nor since) in an action for money or damages against a public entity. At all times pertinent to this cause, California has required, as a condition precedent to suit against a public entity, such as appellee school agencies, the filing of such a claim regardless of whether the tort be intentional or unintentional. The applicable statutes require such filing as to any suit "for money or damages" without exception or limitation. (See *Whitson v. LaPay* (1957), 153 Cal.App.2d 584, 588-589 [4][5], 315 P.2d 45, petition for hearing by California Supreme Court denied; *Farnsworth v. Cote* (1962), 199 Cal.App.2d 762, 769-770, 19 Cal.Rptr. 45.) Certainly, the interpretation and construction of the state statute in this respect is a matter of state not of federal, concern. Like comment applies to appellants' statement that California Labor Code, section 3601, and former California Government Code, section 703(d) (now Gov't Code, §905(d)), combine to exempt appellants from the prerequisite claims requirement. Section 703 (d), now 905(d), provided that statutory provisions relating to claims against local public entities "apply to all claims for money or damages against local public entities except: . . . (d) Claims for which the workmen's compensation authorized by Division 4 (commencing with Section 3201) of the Labor Code *is the exclusive remedy.*" (Italics added.) Under this exception relied on by appellants, it is only when workmen's compensation is the "exclusive remedy" that no claim is required to be presented under the California law. The only body having jurisdiction over workmen's compensation proceedings is the California Industrial Accident Commission. A suit for damages in the California Superior Court cannot and does not come with-

in the exception. The Superior Court has no jurisdiction to award workmen's compensation. (*Scott v. Industrial Acc. Com.* (1956), 46 Cal. 2d 76, 83, 293 P.2d 18.)

In the case at bench, the California District Court held (JSA 9-11) that California law required appellants to have presented a claim as a prerequisite to suing appellee school agencies; that this requirement, under applicable statutory provisions, applied whether the tort asserted was intentional or merely negligent, i.e., "The sections involved require the presentation of a claim 'for money or damages' which on its face includes actions for either negligence or intentional torts." (JSA 10); that appellants' reliance on the exception (where workmen's compensation "is the 'exclusive remedy' ") was erroneous and a misapprehension of the statutory exception; and the California District Court concluded its discussion with (JSA 11):

> "It is to be noted that the demurrer of the public school agencies to appellants' second amended complaint was sustained without leave to amend. This was not an abuse of discretion, however, since two prior complaints had been struck down on the ground that appellants failed to allege the required presentation of the claim. Obviously, appellants could not truthfully allege that they had complied with this prerequisite, and leave for further amendment would have been a fruitless gesture. [Citations.]"

The California District Court here applied established California law and decisions in holding that no recovery could be had against the state school entities in the absence of allegation that the requisite claim had

been presented or filed. Obviously, no federal question is involved therein and the District Court's decision thereon is predicated upon a non-federal basis.

II.
Appellants' Failure Timely or Properly to Raise Federal Question.

While the matters heretofore discussed amply support this motion to dismiss the appeal, another basis exists which here will be shown. Appellants failed timely or properly to raise any federal question.

On page 5 of their Jurisdictional Statement, appellants refer to paragraph VIII of their first count of the second amended complaint, which paragraph they assert raised their federal constitutional claims. They state that they "brought said allegation to the attention" of the California District Court in their Opening Brief, their Reply Brief, and their Petition for Rehearing, and of the California Supreme Court in their Petition for Hearing. With these statements, appellees disagree.

Paragraph VIII of said first count of appellants' second amended complaint was the subject of motion to strike as to part, a motion which was granted by the California Superior Court because the conclusionary allegations were insufficient to present properly any such claim. The allegation made was as follows (stricken part shown by cross-out):

> "That said plan and practice and acts were then (and theretofore had been) countenanced and concurred in by said defendant Board, and was subsequently ratified by said Board, ~~all in contravention of the laws and Constitution of the State of California and of the laws of the United States and of the Fourteenth Amendment to the United States~~

~~Constitution in respect to the vested rights of teachers under contract and with permanent tenure, and as respecting such rights of this plaintiff."~~

At no time on their appeal before the California District Court or in their petition for hearing to the California Supreme Court did appellants make any claim that there had been any error in striking this or any other portion of their pleadings. Even had the stricken portion remained, it is extremely doubtful that the vague reference made, simply to the Fourteenth Amendment to the United States Constitution, would suffice to support a claim of violation of any particular specific provision of that amendment. (*Herndon v. Georgia* (1935), 295 U.S. 441, 442-443, 55 S.Ct. 794, 79 L.Ed. 1530; *Superior Court of the State of California v. Evans* (1940), 309 U.S. 640, 60 S.Ct. 893, 84 L.Ed. 995.) Be this as it may, it is clear that appellants did not timely or properly present any federal question in or through their appeal before the California District Court or the California Supreme Court.

Under California appellate procedure, so far as here material, there are: (1) an Appellant's Opening Brief (Cal.Rules of Court, Rule 13), here filed by appellants; (2) a Respondent's Brief (Rule 14 (a)), here filed by appellees; (3) an Appellant's Reply Brief (Rule 14 (a)), here filed by appellants.[4] Oral argument is per-

[4]As to "Form of Briefs," Rule 15 requires:

"Each point in a brief shall appear separately under an appropriate heading, with subheadings if desired. Such headings need not be technical 'assignments of errors' but should be concise headings which are generally descriptive of the subject matter covered. The statement of any matter in the record shall be prefaced by a topical index of its contents and a table of authorities, separately listing cases, statutes, court rules, constitutional provisions, and other authorities."

mitted (Rule 22) and written decision thereafter is rendered by the appellate court. (Rule 24.) Petition for rehearing is allowed. (Rule 27.) If such be denied, when made as here was done by appellants, petition for hearing by the California Supreme Court is allowed. (Rule 28.) "On petition for hearing the Supreme Court will not examine the record for error, or inquire into the correctness of the facts stated in the [District Court's] opinion unless the petition shows: (1) . . .; or (2) that substantial legal issues raised in the briefs were not considered in the opinion, and that the failure to consider them was set forth in a petition for rehearing." (Rule 29 (b).)

Appellants filed a petition for hearing by the Supreme Court to which appellees filed an answer as permitted by Rule 28 (c).

In an authority cited and quoted by appellants in their Jurisdictional Statement (p. 28), it pertinently is stated (Stern & Gressman's "Supreme Court Practice" (3rd ed.); page 97):

> "But the fact that the federal question was properly raised before the trial court may not be enough. The question must also be pursued on appeal to higher state courts, assuming the state procedure so permits or requires. And it must be pursued in the manner and with the degree of specificity required by the state rules of practice. See *Beck v. Washington*, 369 U.S. 541, 549-554. 'Without any doubt it rests with each state to prescribe that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns

> entirely upon questions of local or general law.' *John v. Paullin,* 231 U.S. 583, 585. See also *Wolfe v. North Carolina,* 364 U.S. 177, 195; *C.I.O. v. McAdory,* 325 U.S. 472, 477; *Parker v. Illinois,* 333 U.S. 571; *General Union Tel. Co. v. Edwardsville,* 269 U.S. 190; *Chesapeake & Ohio R. Co. v. McDonald,* 214 U.S. 191; *Harding v. Illinois,* 196 U.S. 78. Only when such rules are applied as a pretense to avoid a federal constitutional issue or in a manner that discriminates against the assertion of federal claims will the Court ignore or override these state procedural requirements. See *Nickel v. Cole,* 256 U.S. 222, 225."

Appellants did not present or pursue any state or federal constitutional question in the manner permitted or required, under the aforesaid California appellate procedure, to the appellate courts of that state.

1. Appellants' Opening Brief: Appellants state that they "brought said allegation to the attention" of the California District Court on page 4 of their Opening Brief—referring to said paragraph VIII of their second amended complaint. The statement of facts of Appellants' Opening Brief covered pages 2-6 purporting to summarize the allegations of said complaint. On page 4 of their statement of facts, appellants stated: "The vested right by reason of tenure and contract in violation of the Constitution is alleged in paragraph VIII thereof." This is the sole reference made therein to any Constitution. Nowhere, in either the facts or in any discussion of legal points did appellants make any claim that either plaintiff had constitutional rights which were violated by the trial court's decision. No such point was advanced or presented in their Opening

Brief. Nowhere therein did either plaintiff cite or rely upon any Constitutional provision, either state of federal. No constitutional question was raised or discussed in the Opening Brief. Under established California decision, failure of an appellant to raise the legal issue as a point and make argument thereon in his opening brief is deemed a waiver or abandonment of the point. (*Atlas Terminals, Inc. v. Sokol* (1962), 203 Cal.App.2d 191, 209, 21 Cal.Rptr. 293, "The last point raised in appellant's opening brief is denial of due process of law. After asserting this, counsel devote no more attention to it, thus waiving the point." (hearing denied by California Supreme Court); *Bank of America v. Frost, infra* (1962), 205 Cal.App.2d 614, 619, 23 Cal. Rptr. 441; *Blackman v. Kristovich* (1963), 216 Cal. App.2d 792, 795, 31 Cal.Rptr. 413, "In her brief, appellant does not argue the first ground urged below. We may therefore assume that appellant has abandoned assertion of the question of duress. (*People v. Scott,* 24 Cal.2d 774, 783 [151 P.2d 517].)" (hearing denied by California Supreme Court); *Garter v. Metzdorf Associates* (1963), 217 Cal.App.2d 812, 822 [12], 32 Cal. Rptr. 113; *Hogan v. Miller* (1957), 153 Cal.App.2d 107, 117, 314 P.2d 230, "Plaintiff's final complaint is that the court erred in 'refusing to allow defendant Bale to testify whether or not he relied on defendant Martin to put in a window that would be safe.' Neither argument nor authority is offered in support of this point. Under such circumstances we are not called upon to consider it. (*Gray v. Walker,* 157 Cal. 381, 386 [108 P. 278]; *Estate of Volen,* 121 Cal.App.2d 161, 166 [262 P.2d 658].)" hearing denied by California Supreme Court.)

2. Respondents' Brief, filed by appellees, did not discuss or consider any constitutional question for the reason that none had been presented by the Appellants' Opening Brief.

3. Appellants' Reply Brief: Appellants state that they brought the allegation of paragraph VIII of their second amended complaint to the attention of the California District Court on page 5 of their said reply brief. (JS 5.) Their reply brief commenced discussion of *legal* points and issues on page 6. In the reply brief, pages 1-6, they discussed relationship of the parties and, as a subheading entitled "The Proximate Cause of Plaintiff School Teacher's Injury" (pp. 4-6), they stated (p. 5) that the complaint alleged that transfer to another school "would and did affect plaintiff as a threat to her tenure and seniority, in which she had a contractual and statutory right which amounts to a constitutionally vested right as alleged in the complaint. Paragraphs I and VIII of first cause of action." Nowhere in said reply brief did appellants advance any legal point or argument or cite authority which claimed any constitutional violation to have been committed. In fact, as was the case in regard to their Opening Brief, no citation or mention was made of any Constitutional provision, state or federal. Even had they done so, California appellate procedure does not require an appellate court to consider a point raised on appeal for the first time by way of the appellant's reply brief. (*People ex rel. Dept. Public Works v. Garden Grove Farms* (1965), 231 Cal.App.2d 666, 670, 42 Cal.Rptr. 118, "Generally, a contention raised for the first time in an appellant's closing brief requires no consideration and may be disregarded. [Citations.]", hearing denied

by California Supreme Court; *Bank of America v. Frost* (1962), 205 Cal.App.2d 614, 619, 23 Cal.Rptr. 441, "In the closing brief of William he raised for the first time as a point on appeal, the question of special findings requested by him but not made by the court. While this matter was related in the opening brief under the title 'History of Proceedings,' no complaint or contention was made about it in that brief. It may be disregarded by this court. [Citations.]"; *Newell v. Brawner* (1956), 140 Cal.App.2d 523, 527, 295 P.2d 460, "As a rule, points raised for the first time in a reply brief need not be considered by the court and in view of the inadequate presentation of the point we are not inclined to depart from the rule.", hearing denied by California Supreme Court; *Utz v. Aureguy* (1952), 109 Cal.App.2d 803, 807-808, 241 P.2d 639, discussion under "The Briefs on Appeal".)

4. California District Court's decision on appeal: Nowhere in the decision here rendered by the California District Court (JSA 3-13) is there any mention of any constitutional issue or question, either state or federal. The reason is simple. No such problem had been raised, discussed or considered in the briefs on appeal and no such question was before the appellate court. It was not required to consider or pass upon any such question under these circumstances and the authorities above cited.

5. Appellants' Petition for Rehearing: For the *first* and *only* time in any brief or petition filed by appellants in the California appellate courts (or responses filed by appellees), the appellants in their petition for rehearing by the California District Court made any

mention of any Constitution, state or federal.[5] Even then, appellants did not present any discussion or showing as to how or in what manner any constitutional right of appellants had been violated. (See footnote 5 herein.) Even had appellants adequately discussed or argued a constitutional question in the petition for rehearing, it then was belated and entitled to no consideration by the appellate court. It is an established California rule of appellate procedure that points not presented in the briefs will not be considered when presented in the petition for rehearing. (*People ex rel. Dept. of Public Works v. Mascotti* (1962), 206 Cal. App.2d 772, 779-780, 23 Cal.Rptr. 846, "The point must be deemed waived by failure to present it in the briefs. 'Counsel are not permitted to argue their cases in a piecemeal fashion and points not previously argued will not be considered where raised for the first time on petition for rehearing. (*Epperson v. Rosemond,* 100 Cal.App.2d 344, 348 [233 P.2d 655, 224 P.2d 480];

---

[5]The only mention is contained in Point X of the Petition for Rehearing. This Point X was entitled, "Affirmance of the Judgment Sustaining the Demurrer Will be Denial of Due Process and Equal Protection of the Law." The *entire* discussion thereafter made in Point X was as follows: "This issue is raised in paragraph VIII of the first cause of action and incorporated by reference in the other causes of action of the complaint. As affecting tenure of teacher, see in addition to authorities cited in Opening Brief, p. 11, *Ahrensfeld v. State Board of Education,* 126 N.J.L. 543, 19 A.2d 656; As concerns seniority rights, *Texas & P. Ry. Co. v. Brotherhood of R. Trainmen,* 63 F.Supp. 640, 159 Fed.2d 822; As to right to work without coercive action: *Bautista v. Jones,* 25 Cal.2d 746, 155 Pac.2d 343; Constitution of California, Article I, §§ 1, 13, 21; Art. 4, §25; United States Constitution, Amendment 14. This court should not disregard this issue, especially in considering the next point below." The following Point XI was entitled, "In View of the Foregoing Points I to X, All Inclusive, Showing that the Grounds for the Decision Adverse to Appellants are each and all Untenable, the Judgment Sustaining the Demurrer is in Error and Should be Reversed." No constitutional claim was asserted or discussed in said Point XI.

4 Cal.Jur.2d Appeal and Error, §522, p. 365.)' (*Smith v. Crocker First Nat. Bank,* 152 Cal.App.2d 832, 837 [314 P.2d 237].) 'No such point was suggested in the argument on which the petitioners submitted the case for decision. It is the settled rule of this court that points made for the first time on petition for rehearing will not be considered.' (*A.F. Estabrook Co. v. Industrial Acc. Com.,* 177 Cal. 767, 771 [177 P. 848].)", petition for hearing by California Supreme Court denied; *Epperson v. Rosemond* (1950), 100 Cal.App.2d 344, 348, 223 P.2d 655, 224 P.2d 480, "Appellants in their petition for rehearing are now seeking to change their basis of attack on the judgment. 'Appellate courts cannot submit to piecemeal argument and will not consider on petition for rehearing questions not previously raised.' (*Bradley v. Bradley,* 94 Cal.App.2d 310, 312 [210 P.2d 537, 211 P.2d 638].)", petition for hearing by California Supreme Court denied.)

6. Appellants' Petition for Hearing by California Supreme Court: Nowhere in appellants' petition for hearing by the California Supreme Court was it claimed that appellants had advanced and that the California District Court had failed to pass upon any constitutional question or issue, either state or federal. (See *supra* Cal.Rules of Court, Rule 29 (b) and partial quotation thereof.) Nowhere in said petition for hearing was any reference made to any Constitution, state or federal, and nowhere was any argument advanced that any constitutional question or problem existed.[6] Cer-

[6]On page 5 of their Jurisdictional Statement, appellants state that they "brought said allegation [paragraph VIII of their second amended complaint] to the attention" of the California Supreme Court "in their petition to the California Supreme Court for Hearing (p. 7)." Appellees have searched in vain throughout the Petition for Hearing for any reference to either paragraph VIII or any constitutional problem. On page 7 of said

tainly, it cannot be successfully asserted that appellants thereby presented any constitutional problem to the California Supreme Court by their petition for hearing. (Cal.Rules of Court, Rule 29(b), supra. See also *Nemo v. Farrington* (1908), 7 Cal.App. 443, 451, 94 Pac. 874, opinion Supreme Court denying hearing; *Brown v. Coffee* (1911), 17 Cal.App. 381, 386, 121 Pac. 309, opinion Supreme Court denying hearing.)

Not only is it questionable whether appellants properly raised any constitutional question in the trial court, but it appears from the foregoing that appellants neither properly nor timely raised any such question on appeal before either the California District Court or the California Supreme Court.

Conclusion.

It is respectfully submitted that the appeal should be dismissed pursuant to Rule 16(1)(b) of the Revised Rules of this Court.

Dated: June 23, 1966.

HAROLD W. KENNEDY,
County Counsel,
VEATCH, THOMAS, CARLSON & DORSEY,
WAYNE VEATCH, and
HENRY F. WALKER,
Counsel for Appellees.

---

petition, Point VIII was entitled, "Affirmance of the Judgment Sustaining the Demurrer Rests on Assumption of Facts not Pleaded and Which are Not Properly to be Taken into Consideration by Judicial Notice." The opening sentence thereafter was, "See Points X and XI of Appellants' Petition for Rehearing." The remainder of the discussion (pp. 7-8, Pet. for Hear.) consisted of the claim or argument whether any filing of a claim was required by California law under the facts alleged in the pleading. Nothing was advanced pertaining to any constitutional question, either state or federal.

BLANK PAGE

BLANK
PAGE

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 15 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. [redacted] 217

JOHNNIEMAE PATTERSON TIETZ, et al.,
Appellants,

vs.

MICHAEL J. MARIENTHAL, et al.,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

APPELLANTS' REPLY TO APPELLEES' MOTION TO DISMISS

J. B. TIETZ
257 South Spring Street
Los Angeles, California
Attorney for Appellants

ARTHUR E. BRIGGS
Of Counsel

E. L. MERRIHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3080

BLANK
PAGE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1399

JOHNNIEMAE PATTERSON TIETZ, et al.,
Appellants,

vs.

MICHAEL J. MARIENTHAL, et al.,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

APPELLANTS' REPLY TO APPELLEES' MOTION TO DISMISS

In reply to appellees' motion to dismiss, appellants will briefly emphasize the one point which appears to be governing upon all issues of the case as we see it. That is the question whether the school principals acted in such a manner as to make applicable the rule relating to discretionary power in an administrative function.

Point I of the Appellants' Jurisdictional Statement presents this question and quotes the statement by the court relative to the principals that the sole issue before the court is that of "discretion inherently or by law made a part of their respective positions." The argument of appellees joins issue on that point in their Argument No. I, pages 4,et seq.

DOES DISCRETION MEAN LICENSE TO COMMIT THE INTENTIONAL TORT OF THREAT AND DURESS?

Appellants contend that, if the principals exceeded their authority and discretionary powers and committed an intentional tort of threat and duress, such act is not within the exemption of discretionary power and furthermore, that in such a case, because of the exemptions of Government Code 905 (a) and Labor Code 3601 (a) the claims statutes do not apply and therefore that the decisions of the state courts are clearly, in this case, a denial of due process of law and of equal protection of law to plaintiff-appellants.

Accordingly, appellants desire to cite now only authorities defining discretion.

As stated in *Davis* v. *Shigley,* 100 N.E.2d 261, 263, 88 Ohio App. Ct. 23:

> "Discretion ordinarily means sound discretion, not wilful or arbitrary, but regulated by well known and established principles of law, or such as may be exercised without violating any principle of law."

An early opinion of the California Supreme Court in *Bailey v. Taaffe,* 29 Cal. 422, 427, which has been repeatedly quoted by California Courts, defines discretion, as follows:

"The discretion intended however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion to be exercised in conformity with the spirit of law, and in a manner to subserve and not to impede or defeat the ends of substantial justice."

Atkinson v. *Atkinson*, 35 Cal.App.2d 748, 753, 96 P.2d 824, 825;

See also *Osborn* v. *United States Bank*, 22 U.S. (9 Wheat.) 838, 866, 6 L.ed. 204.

Chief Justice Marshall there held discretion is "the will of law," and not of the judge or person.

People v. *Calvert*, 277 P.2d 834, 837, 838, 129 Cal. App.2d 693, 697;

Merritt v. *School District*, 157 P.2d 989, 991, 22 Wash. 887;

Tice v. *State Industrial Accident Commission*, 195 P.2d 188, 191, 183 Ore. 593;

State ex rel. Robert v. *Knox*, 14 So.2d 262, 264, 153 Fla. 165;

Scott v. *City of LaPorte*, 68 N.E. 281, 162 Ind. 34.

As to whether appellants have sufficiently raised the federal question in the state court, appellees' Motion to Dismiss virtually admits Appellants' contention that it was presented in the plaintiffs' complaint, Paragraphs I and VIII of the first cause of action, and in each of Appellants' briefs on appeal.

(Their Argument No. I, pages 13 et seq.) See Point V, pp. 28-29, of Appellants' Jurisdictional Statement.

See the review of authorities in Stern and Gressman, Supreme Court Practice, § 3-27, pp. 94 et seq.

Respectfully,

J. B. TIETZ
257 South Spring Street
Los Angeles, California
Attorney for Appellants

ARTHUR E. BRIGGS
Of Counsel

BLANK
PAGE

BLANK
PAGE

Office-Supreme Court, U.S.
FILED
NOV 4 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965
No. 1399
or
OCTOBER TERM, 1966
No. 217

JOHNNIEMAE PATTERSON TIETZ, et al.,
Plaintiffs and Appellants,

vs.

MICHAEL J. MARIENTHAL, et al.,
Defendants and Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

PETITION FOR REHEARING

J. B. TIETZ
257 South Spring Street
Los Angeles, Calif. 90012
Attorney for Appellants

ARTHUR E. BRIGGS
Of Counsel

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

BLANK
PAGE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965
No. 1399
or
OCTOBER TERM, 1966
No. 217

JOHNNIEMAE PATTERSON TIETZ, et al.,
Plaintiffs and Appellants,

vs.

MICHAEL J. MARIENTHAL, et al.,
Defendants and Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

PETITION FOR REHEARING

In requesting rehearing of our appeal, denied on the ground of no federal jurisdiction involved, we fear that the Court's decision was due to the considerable involvement of argument in our Statement of Jurisdiction as well

as the repetition of appellees' Motion to Dismiss which insists that there is no federal question involved and that "the decision rests entirely on non-federal basis" and "is a question of state, not federal, concern."

Appellees' argument does not state the rule relating to the federal courts following the construction of a state court construction of a statute, nor the exception thereto, to which we call attention now by quoting authority, abundantly supported by decisions of this Court:

> "However, where a state statute is so construed as to render it open to the objection of repugnancy to the federal constitution, there is presented a federal question authorizing a review.'
>
> 36 CJS 737, #326, note 77, citing numerous cases;
>
> 25 CJ 944, #303, note 86
>
> "So, too, the federal court need not follow the state court decision on its own statutes, where following the state decision would conflict with the efficiency of some principle of the United States Constitution . . . or involve a violation of the Constitution of the United States."
>
> 36 CJS 401, #171, note 31, citing cases;
>
> 25 CJ #878, note 81.

The simple issue herein involved is whether the state statutes cited give absolute authority to the school principals on the assumption of the administrative discretion to commit any tort whatsoever, and is therefore unconstitutional.

In reply to appellees' Motion to Dismiss appellants filed a brief statement of authorities to the effect that discretion is not the mere will of the administrative officer but must be exercised in accordance with law. This question we think is adequately considered in Point I of appellants' Jurisdictional Statement, pages 8 to 15.

We think, maybe, this Court has overlooked the distinction between the principals' liability and that of the defendants School District and Board of Education which was recognized and stated by the state court on page A8 of Appendix of Jurisdictional Statement, to wit: "The governmental immunity of the public school agencies is governed by other principles of law." As follows in the opinion, it is clear that the court distinguished the case of those public school agencies and contended that the statutes relating to claim applied to the public school district and school board, and not to the principals. That is important because that leaves the question of immunity of liability of the principals to rest wholly and solely upon the question of the scope of discretion which was stated in our argument, page 8, quoting the court, which considered *that* the sole issue before it, in so far as the principals are concerned.

Making the distinction between the principals, on the one hand, and the school district and school board, on the other, makes clear that, while the claim statutes and the state court's decision thereon may be regarded as a state matter and not a federal question and therefore determinable by the state court's ruling, even though erroneous, it has no application to the principals whose discretionary authority is a matter which is not similarly determinable only by the decision by the state court but rests upon the civil rights, fundamental, personal civil rights, which are subject to the constitutional provisions and guaranty of due process of law and equal protection of the law.

Points II and IV of appellants' Jurisdictional Statement argue the liability of the school district and the board of education for the principals' tortious act.

By distinguishing appellants' Point I as to the principals, from appellants' other points of the Jurisdictional

Statement, we do not concede that the latter are state matters and not subject to the exception to the general rule of following state decisions and adopting their construction as to purely state jurisdictional matters. We still contend that the change in the claims statutes subsequent to the inception of the cause of action and also to the filing of the complaint, which revision of statutes wholly changed the nature and type of notice of claim, constitutes a denial of due process and of equal protection of the laws, as argued in our Jurisdictional Statement.

Respectfully submitted,

J. B. TIETZ
257 South Spring Street
Los Angeles, Calif. 90012
Attorney for Appellants

ARTHUR E. BRIGGS
Of Counsel

CERTIFICATE OF COUNSEL

This Petition for Rehearing is filed in good faith and not for the purpose of delay. It is restricted to the grounds specified.

.....
J. B. TIETZ

October 31, 1966

END